United States

Circuit Court of Appeals

For the Ninth Circuit.

MAINE NORTHWESTERN DEVELOPMENT COMPANY, a corporation, *Appellant,* vs. NORTHWESTERN COMMERCIAL COMPANY, a corporation, *Appellee.*	No. 2773.

BRIEF OF APPELLANT.

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MET. PRESS, SEATTLE

SUBJECT INDEX

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BRIEF OF MAINE NORTHWESTERN DEVELOPMENT COMPANY, Appellant

STATEMENT OF CASE.

This is an action at law by the Maine Northwestern Development Company, a corporation of the state of Maine, called herein the plaintiff, against the Northwestern Commercial Company, a corporation of the state of Washington, called herein the defendant, to recover on assessments or calls on defendant's subscription to plaintiff's preferred stock.

As a full and clear statement of the organization

of plaintiff is necessary to a proper understanding of the issues involved we will go at length into the matter.

Some time in December, 1905, one Leigh H. French interested John Rosene (then and until subsequent to October, 1907, president of defendant), in certain mining claims and water rights in Alaska (Test., Rosene, witness for defendant., Record pp. 136-137); and furnished Rosene reports of certain mining experts concerning the same (Id., p. 137); according to these reports there was not less than $50,000,000 in gold locked up in the frozen ground of these mining claims (Id., p. 152); Rosene made inquiries as to the character of the experts (Id., p. 138), who were competent and reliable engineers (Id., p. 152); and Rosene at that time believed their statements as to values (Id., p. 152); $245,000 was the price of the properties or mining claims (Id., p. 128), Rosene had interested A. A. Housman, a Mr. Myers and a Mr. Farquhar in the properties and a scheme to build and operate a railroad in connection with their development (Id., pp. 126-127); and it was agreed among them to organize a corporation to take over these properties and build the railroad;

One McConnell, owner of the mining claims and water rights, wanted cash on the sale; the Company

was not yet organized and had no funds and it was agreed that Myers should and he did pay $25,000 for an option on half of the capital stock of the proposed corporation, Housman would take whatever Myers would not take, Farquhar $250,000, Rosene $250,000 for defendant, Housman $50,000 for himself and Rosene $50,000 for himself (Id., p. 129); Rosene insisted that Housman should not take any subscriptions until stockholders of defendant had been given an opportunity to take anything they wanted of it (Id., p. 130). A pool was made up to which Housman contributed $50,000, Myers $25,000, and Rosene $50,000 (Id., p. 130); Rosene had already paid French $20,000 on account of the purchase price of these claims in February (Id., p. 162); and the properties were conveyed to Rosene on or about March 15, 1906, by McConnell, having the record title, on the further payment on the purchase price to McConnell on that day of $93,000 and delivery by Rosene of his personal note to McConnell for $100,000.

Thereupon, on March 17, 1906, at the instance of Rosene and his associates, Housman, French, Myers and Farquhar, the plaintiff was incorporated under the name of Northwestern Development Company with its home office at Portland, Maine, with a capital stock of $6,250,000 divided into two classes, to-

wit: one class, $2,500,000 preferred stock, divided into 500,000 shares of the par value of $5 each; and the other class, $3,750,000 common stock, divided into 750,000 shares of the par value of $5 each, expressly to carry on, among other, the following lawful business:

To purchase or otherwise acquire from John Rosene one hundred and seventy-one certain mining claims and certain water rights in Alaska, and as payment therefor to issue and deliver $3,750,000 par value of full paid and non-assessable shares in the common stock of the corporation and to pay the sum of $245,000 in cash on the terms of an agreement to be authorized by its board of directors.

(Articles of Agreement, Subd. (a), Exhibit D4, Record p. 44.)

The preliminary organization of plaintiff was perfected on March 17, 1906, at a meeting of the signers of the Articles of Agreement at Portland, Maine, by adopting the Articles of Agreement as to corporate name and purposes, designating Portland, Cumberland County, State of Maine, as location of corporation, adopting a code of By-Laws, fixing the amount of capital stock, its kinds, and amount and par value of each kind, as above; and directing subscriptions to its capital stock to be opened;

Whereupon the original signers of the Articles

of Agreement subscribed to the capital stock as follows:

Jas. J. Hernan, for two shares; W. F. Crummett, for two shares; Geo. C. Ricker, for two shares; J. L. Brophy, for two shares; Clarence E. Eaton, for three shares.

Thereupon a board of five directors and a President, Vice President, Treasurer and Secretary were elected, the Treasurer authorized to receive further subscriptions to the capital stock; the president, treasurer and a majority of the directors authorized to prepare the certificate of organization or incorporation as required by the laws of state of Maine, to cause same to be examined and certified by the Attorney General of Maine and recorded in Registry of Deeds of Cumberland County, where corporation's business was to be done and file certified copy thereof in the office of Secretary of State of Maine.

(Min. meeting of Signers of Art. of Agreement, March 17, 1906, Ex. D5, Record, p. 44.)

The Code of By-Laws, among other things, provided:

No. 3. *Officers*: For a president, one or more vice presidents, a treasurer, one or more assistant treasurers, a secretary, a clerk and a board of five directors; (afterwards increased to nine directors)

No. 6. *Powers of Board of Directors*: That the property and business affairs of corporation shall be managed by the board of directors, who may exercise all such powers of the corporation as are not by law or by these by-laws required to be otherwise exercised.

No. 8. *Executive Committee*: For an executive

committee of three or more directors, to be designated by the board of directors, which committee shall have and may exercise all the powers of the board in the management of the business and affairs of the corporation.

No. 9. *Delegation of powers of directors*: That the board may delegate any of its powers to committees.

No. 25. *Issue of capital stock in payment of certain properties*: That the corporation may purchase from John Rosene 171 certain mining claims and certain water rights in Alaska and may issue and deliver in payment therefor $3,750,000 common stock full paid and pay sum of $245,000; all certificates issued for shares in capital stock shall contain an express reference to these by-laws and holder of any such shares by accepting any such certificate either before or after the purchase of said mining properties thereby consents and agrees that all said shares so issued in payment of such properties shall be or were issued fully paid by the sale and transfer thereof and are not liable to any further calls or assessments. And notice is hereby expressly given that all shares in the capital stock are issued and accepted upon the express understanding that there shall be no liability on part of incorporators, organizers or promoters of this corporation by reason of any fiduciary relation or because they have fixed the price payable by this corporation for said properties; And no contract or arrangement made on behalf of this corporation with any other corporation or any officer or director of this corporation shall be rendered void or voidable by reason of the fact that such officer or director of this corporation is interested in such contract. And it is understood and agreed that every present and future stockholder of this corporation assents to the terms, conditions and circumstances on

and in which said mining properties have been purchased and acquired by this corporation and the shares of stock of this corporation have been or are to be issued as aforesaid.

(Exhibit D6, Record, pp. 45, 49, 55.)

At the first meeting of the board of directors of plaintiff, held at Portland, March 19, 1906, the president, vice president, secretary and treasurer were elected; the certificate of organization of the corporation duly prepared and bearing the certificate of approval of the Attorney General of State of Maine and certificate of record of Register of Deeds of Cumberland County, Maine, and of the Secretary of State of Maine, was presented and placed on file; a corporate seal was adopted, an office of the corporation was, by resolution, established in the City of New York and meetings of its board of directors authorized to be held at the principal office of the corporation in Maine, or at such office in the City of New York or elsewhere as the board should from time to time order.

(Min. first meeting pltff's board of directors, March 19, 1906, Ex. D7, Record, p. 45.)

Thereafter, at the first annual meeting of plaintiff's stockholders held at Portland, on March 19, 1906, at which all of the shares in the captial stock of the corporation subscribed for, issued and outstanding were represented in person by the subscribers thereof, there was presented and ordered filed the Certificate of Organization of the corporation duly prepared and bearing the certificate as above stated; there were pre-

sented and approved and placed on file the following transfers of subscriptions to its capital stock:

Clarence E. Eaton to A. A. Housman for one share;
Jas. J. Hernan to Leigh H. French for one share;
Geo. C. Ricker to Henry C. Davis for one share;
W. F. Crummett to George Henderson for one share;
J. L. Brophy to Edward A. Pierce for one share.

A board of directors were thereupon elected as follows:

Directors: Housman, French, Davis, Henderson and Pierce; Clerk: Millard W. Baldwin.

(Min. first annual meeting pltff's stockholders, March 19, 1906, Ex. D8, Record, p. 45.)

On March 20, 1906, the balance of the original subscriptions to plaintiff's stock by the Signers of the Articles of Agreement, to-wit, the subscriptions of

Jas. J. Hernan, for one share;
W. F. Crummett, for one share;
Geo. C. Ricker, for one share;
J. L. Brophy, for one share;
Clarence E. Eaton, for two shares.

in all six shares, were transferred to John Rosene.

(Min.-book of pltff., 1906, page 40, Ex. E21, Record, p. 54).

Thereafter at the first meeting of the board of directors elected at the first annual meeting of plain-

tiff's stockholders, held at New York, on March 20, 1906, at which all directors were present, a president, 2nd vice president, secretary and treasurer were elected; the chairman announced that John Rosene had offered to sell to the plaintiff certain mining properties in Alaska in consideration of the issue to him of $3,750,000 par value of full paid and non-assessable common shares in the capital stock of plaintiff and of the payment to him of $245,000 in cash, in accordance with a proposed agreement to be entered into between Rosene and plaintiff, form of which was there presented, under which the certificates of said shares were to be issued as follows:

A. A. Housman, 1 share;
Leigh H. French, 1 share;
Henry C. Davis, 1 share;
George Henderson, 1 share;
Edward A. Pierce, 1 share;
John Rosene, 749,995 shares;

which should include the shares subscribed for by said Eaton, Hernan, Ricker, Crummett and Brophy at the organization of the corporation and whose subscriptions had been by them assigned and transferred to said Housman, French, Davis, Henderson, Pierce and Rosene and said assignments accepted by them and the corporation, to which form of agreement was attached schedules of the mining claims and water rights proposed to be sold; and thereupon, upon motion, it

was unanimously voted that in the judgment of the board of directors said properties were necessary for the business of the corporation and the value as stated in said agreement, to-wit, $3,995,000 was fair and reasonable; the proper officers of the corporation were authorized and directed on behalf of plaintiff to execute and deliver the said agreement between it and Rosene; the proper officers of the corporation upon the execution and delivery of the agreement and in accordance therewith, were authorized and directed to issue and deliver to order of Rosene 750,000 full paid non-assessable common shares of capital stock of plaintiff of the par value of $5 each amounting to $3,750,000 and to pay to Rosene $245,000 in cash; an assessment was thereupon voted of 100 per cent to be levied upon the shares already subscribed as evidenced by the original subscriptions on file; and upon motion it was duly resolved that said properties be and they were accepted in full payment of the subscriptions for stock of the signers of the Articles of Agreement and the original subscribers to said stock, and that full paid stock be issued to them or their assigns to amount of their respective subscriptions upon execution and delivery of said Agrcement and conveyance of said properties; the chairman then presented the form of a Supplemental Agreement proposed between Rosene and plaintiff relating to subscription at par for 500,000

preferred shares of its capital stock whereby, after reciting the said Agreement for the sale of said properties as executed and delivered for the consideration therein named, it was agreed that plaintiff should use its best endeavors to secure subscriptions at par to 500,000 shares of its preferred stock and that Rosene should deposit with A. A. Housman & Co., 500,000 shares in common stock at par and agreed that the same might be delivered at the rate of one share of common with each share of preferred stock paid for at par and that said common stock should be retained and applied by said depositaries for said purpose; upon motion the proper officers were authorized and directed to execute and deliver on behalf of plaintiff said Supplemental Agreement between plaintiff and Rosene; and an office of the corporation was established at New York City for board meetings, etc.

(Min. meetings of pltff's board of directors, March 20, 1906, Ex. D1, Record, p. 43).

At a meeting of plaintiff's board of directors held at New York on March 21, 1906, the forms of the preferred and common stock certificates were adopted; :he treasurer announced the execution and delivery of the Agreement and Supplemental Agreement authorizd by the board at its meeting of March 20, 1906, and the delivery by Rosene to plaintiff of a conveyance of

the mining properties, as provided in said Agreement; the number of directors were increased from 5 to 9 and Rosene, McLaren, Williams and Trenholme were elected to fill the vacancies thus created and Rosene and McLaren being present took their seats as members of the board; the matter of the appointment of an Executive Committee was discussed and no action taken being for the present deferred; McLaren was elected 1st vice president; Williams, 3rd vice president and Trenholme, assistant secretary; Rosene was appointed managing director with full power and authority to take charge of the operations of the company and was also elected chairman of the board; the managing director was authorized to have organized a railway company to be known as the Seward Peninsula Railway Company.

Min. meeting of pltff's board of directors, March 21, 1906, Ex. D2, Record, p. 43).

At a meeting of plaintiff's stockholders held at Portland on March 29, 1906, at which all of the capital stock of plaintiff subscribed for, issued and outstanding, to-wit; 11 shares, was represented, the board of directors was increased from 5 to 9 directors and the board authorized to fill vacancies thus created and the certificate required by law as to increase of board was directed to be filed with the Secretary of State of

Maine; and on motion all the acts and proceedings of directors at their meetings of March 20 and 21, 1906 as shown by the records of said meetings, including increase in number of directors and election to fill such vacancies were ratified, approved and confirmed.

(Ex. D9, Record 46, Min. of Stockholders, March 29, 1906).

And for the common stock of plaintiff covering the original subscriptions for 11 shares at the meeting of signers of Articles of Agreement, which as to 5 shares were transferred on March 19, 1906, and as to remaining 6 shares were transferred on March 20, 1906, as above, certificates of stock were issued as follows:

On March 20, 1906, to

Housman	Certificate No. G1, for 1 share
French	Certificate No. G2, for 1 share
Davis	Certificate No. G3, for 1 share
Henderson	Certificate No. G4, for 1 share
Pierce	Certificate No. G5, for 1 share

On March 21, 1906, to

McLaren	Certificate No. G6, for 1 share
Williams	Certificate No. G7, for 1 share
Trenholme	Certificate No. G8, for 1 share
Rosene	Certificate No. G9, for 3 shares
	11 shares

(Transfer Book, Common, of pltff., Exhibits E11 to E14, Record, p. 57).

On March 30, 1906, the balance of the common stock was issued to Rosene in Certificate No. G10 for 749,989 shares; and on April 2, 1906, Certificate No. G10 for 749,989 shares common was surrendered and cancelled and in lieu thereof plaintiff issued common stock as follows:

To Rosene, Certificate No. G11, for....100,000 shares
To Rosene, Certificate No. G12, for.... 80,000 shares
To Rosene, Certificate No. G13, for.... 70,000 shares
To A. A. Housman & Co., Certificate
No. G14, for ....499,989 shares

(Id., p. 57).

All in accordance with the Agreement and Supplemental Agreement between plaintiff and Rosene, authorized by plaintiff's board of directors on March 20, 1906, as above set forth.

Agreeable to the understanding between Rosene and his associates in plaintiff corporation, Rosene mailed from San Francisco to A. A. Housman, treasurer of plaintiff, at New York, as an enclosure to the "Dear Arthur" letter of April 4, 1906, (Ex. E1, Record, p. 50) the subscription made by him on behalf of defendant, to $250,000 of the preferred stock of plaintiff (Ex. E2, Record, p. 50).

Subsequently, in April, 1906, at a meeting of defendant's board of trustees, at Seattle, Rosene in person reported his action in thus subscribing on behalf

of defendant, and at the same time reported a payment by defendant to plaintiff on account of that subscription, of $50,000. (Record, p. 72).

This payment of $50,000 was entered in the Seattle journal and ledger of defendant, under date of April 30, 1906, as a credit to plaintiff's account and a debit to "Investment" account (Ex. K1, Record, p. 66); and was included in the item "captial assets, $2,917,532.96" in defendant's Annual Report to its stockholders for year ending April 30, 1906 (Ex. N1, Record, p. 71-72).

Upon defendant's board of trustees receiving report from Rosene of said subscription, a discussion arose as to the authority of Rosene to so subscribe, all trustees except Rosene contending he had no such authority. Rosene asked the board as a matter of courtesy to him not to put anything on the minutes with reference to his subscription, stating that he would dispose of the subscription and the stock represented by that subscription, in a few days and then call the board together again, and the board acquiesced in his request. (Record, pp. 72, 94, 80, 104).

According to the contention of plaintiff, and it introduced positive evidence to support it, no motion or resolution affirming or disaffirming the subscription was carried or adopted by defendant's board at which

the subscription was reported but the board adjourned that meeting with the expectation of having the matter again come before it at a subsequent meeting (Record, p. 73); according to the positive evidence of defendant its board at that April meeting formally adopted a resolution disaffirming and repudiating that subscription. (Record, pp. 80, 93, 104).

But notwithstanding defendant's trustees were very much excited and afraid they were going to make a loss and, as it was a large amount, they did not want to take any chances (Record, p. 96), defendant made no record on its minutes of any motion or resolution, either in the official minute book or by way of any memorandum kept by the secretary; and their then attorney claims that his notes of the particular matter taken at that April meeting he threw away. (Record, p. 85).

What the defendant, through its board of trustees, actually did, is one of the issues of the case.

There is no contention on defendant's part that it made any demand on plaintiff at any time for a surrender and cancellation of the subscription; and that subscription was in fact retained by plaintiff until offered in evidence at the trial of the case at bar. (Ex. E2, attached to Pierce's New York deposition, Record, pp. 50, 77).

As to the $50,000 reported already paid by defendant on the subscription, Rosene was to dispose of the stock (represented by that subscription) and call the board together again (Test. Thomsen, Record, p. 72); Rosene would have the company relieved from what he had done and others would take the subscription; would return the $50,000 to the treasurer which he had paid and the company would not have any obligation out (Test. Hartman, Record, p. 80); that Rosene would let the people who had subscribed in the east take the stock in their stead (Test. Treat, Record, p. 94); that Rosene was to sell—he was to reimburse them (defendant) even for the $50,000—the amount was to be made good to the Commercial Company (Test. Trenholme, Record, p. 106).

Shortly after that April meeting the defendant's secretary met plaintiff's president, Mr. Henry C. Davis, partner of A. A. Housman & Co., and resident at New York, at the entrance of the Butler Hotel, Seattle, and they walked into the hotel and sat down and talked about the plaintiff and Davis asked about the trouble they were making for Rosene, what it was all about and defendant's secretary told him of the action of defendant's trustees with reference to that subscription. (Test. Trenholme, Record, p. 105).

The plaintiff's field of operation was in Alaska and

in the spring and summer of 1906 it was assembling at Seattle and shipping to Nome equipment and material for railway construction on the Seward Peninsula.

The defendant owned one corporation, the Northwestern Steamship Company, operating steamers between Seattle and Nome as a common carrier, another, the North Coast Lighterage Company, lightering cargoes from steamers at Nome roadstead; and another operating stores at Nome (Test. Treat, Record, p. 98).

The defendant acted as a clearing house for plaintiff at Seattle, disbursed all plaintiff's funds; and all of the funds that plaintiff spent at Nome during the season of 1906 in building the railway there were handled through defendant's account, that is their company's disbursements; when plaintiff at Nome ordered any money they drew on themselves at Seattle which draft was cashed by defendant at Seattle and defendant was reimbursed by drawing on plaintiff at New York; they carried all of plaintiff's freight that summer amounting to thousands of tons, it went forward prepaid and they always handled their business on a simple cash basis (Test. Trenholme, Record, p. 108); freight was prepaid in cash by plaintiff to N. W. Steamship Company that season in the sum ap-

proximately of $174,000 (Exhibits AA and BB, Record, pp. 101, 102, 109).

Defendant was the clearing house for plaintiff, taking care of plaintiff's drafts and drawing on plaintiff at New York to cover itself (Test. Trenholme, Record, p. 118) crediting plaintiff and itself taking credit at its bank upon those drafts (Id., p. 118). At all times defendant did that right from the inception (Id., 118) approximate charges by defendant against plaintiff between April 18 and August 31, 1906, at least $400,000 (Ex. K1, Id. 108). In October, 1906, a balance of account between plaintiff and defendant was struck, in favor of plaintiff in the sum of $32,232.78 (Ex. K1), which was settled by defendant's check to plaintiff at Seattle (Record, p. 68).

While meetings of defendant's board were had between April and September of that year, the matter of the subscription did not again come before that board until September, 1906 (Record, pp. 73, 113).

In the meantime, Rosene not only did not dispose of the stock represented by defendant's subscription or of the subscription, or refund the $50,000 paid in April on the subscription, but he gave written instructions to the auditor of defendant to credit plaintiff on account of the subscription the sum of $25,000 (Exhibit 1, Record, pp. 68, 113-114), July 15th, 1906;

this amount was the 10 per cent of the subscription due on that date under its terms.

Trenholme, secretary of defendant, learned of this memorandum and the entries made pursuant to it before the September meeting of defendant's board (Record, p. 113-114); and notwithstanding he had supervision of the entire affairs of defendant (Record, p. 106) and though the plaintiff had a credit on defendant's books on July 15, 1906, of $75,000 (Record, p. 114, Ex. K1) neither the credit to plaintiff on April 30th of $50,000 nor the credit on July 15th of $25,000, was charged back to plaintiff (Record, p. 115).

On September 5th, following, the matter again came before defendant's board. The minutes of that meeting read as follows:

> The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed. And Mr. Thomsen introduced the following resolution: "Resolved that the president be authorized to subscribe to the stock of the Northwestern Development Company for this company in the sum of $125,000." Mr. Thomsen moved the adoption of the above resolution and the same being seconded by Mr. A. J. Trimble, the same was put to a vote and unanimously carried. * * *
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* * * The following resolution was introduced by Mr. Thomsen and seconded by Mr. A. J. Trimble and unanimously adopted, namely:

"Whereas, it is necessary to provide funds to build

and purchase additional steamers for the company's use;

"Resolved that the president be instructed to sell and dispose of the stock held by this company in the Northwestern Development Company down to fifty thousands dollars." (Exhibit H, Record, pp. 59, 94).

The subscription referred to in the minutes as being fully discussed was the subscription in suit (Record, p. 88).

But notwithstanding that Hartman, then attorney for defendant, present at that meeting and draftsman of the resolution "embodied what as a lawyer he thought carried out the transactions as it was transacted that day before the board, as he understood the action; that he put in every element that had any bearing on the question so far as he remembered it" (Record, p. 88), the action of the board was not a new or independent transaction; but was, on the part of defendant, a "compromise arrangement" (Record, pp. 90, 95).

As expressed by witnesses for defendant, present at that meeting: the board looked upon the subscription, they had gotten into a disagreeable frame of mind and they wanted finally to "give and take" and get out of it the best way they could (Record, p. 87); it was a disagreeable matter for them; that was the way they talked about it and they wanted to get out and be

relieved of the situation and the discussion and the embarrassment and the entanglement with as little loss as possible (Record, p. 88); a compromise arrangement believed to be for the interest of all the parties and was so stated and acted upon in that way when they voted on this resolution (Record, p. 90) a compromise arrangement (Record, p. 95); they decided to take $125,000 of that subscription; that was what they decided to do; their books showed that they (plaintiff) had already been paid a certain sum on the subscription so they decided after discussing it very, very thoroughly that they would take $125,000 (Record, p. 115); they wanted to close it up and make,—if they were going to do anything, they wanted to make a subscription for $125,000 (Record, p. 116); as their then president, testifying as defendant's witness, expresses it:

"Well, I caused the Northwestern Commercial Company — money and property to be given to the Northwestern Development Company but without the Commercial Company's knowledge except my own personal knowledge in each instance and afterwards of course the directors of the Northwestern Commercial Company decided to ratify my acts that had been done unknown to them and unauthorized by them by my making this subscription." (Record, p. 165); * * *

"In other words, the members of the board of the Commercial Company acquiesced in what I had

already done and expressed it in that form" (referring to resolution of Sept. 5) (Record, p. 169).

At the date of this meeting, September 5, but $75,000 had been paid or credited plaintiff on the subscription; $50,000 on April 30th and $25,000 on July 15th; and the books of the defendant, which its then president Rosene states he has yet the first time to find any incorrectness in (Record, p. 168), shows that on September 5, the plaintiff was indebted to defendant in the sum of $17,692. (Ex. K1), (Record, pp. 118-119).

And the defendant, at a time when it had theretofore credited plaintiff with the $75,000 on the subscription in suit, not only as a "compromise," ratified the subscription in the sum of $125,000 but at the same meeting directed the sale of the stock held by it in the plaintiff down to $50,000. (Record, p. 59).

Subsequently defendant credited plaintiff on account of the subscription as follows: on Sept. 6th, 1906, $25,000 and on Sept. 15th, 1906, $25,000 (Record, p. 66, Ex. K1).

No subscription for $125,000 of plaintiff's preferred stock was ever made by defendant or by any one in its behalf pursuant to the resolution of its board of Sept. 5th, or otherwise (Record, pp. 76, 170).

Subsequent to the September meeting of defendant's board and in the same month, Rosene, in New York City, orally reported to Davis, then president, Housman, then treasurer, and Henderson, then secretary, and all with himself, directors, of plaintiff, what had taken place at defendant's board meeting on Sept. 5th; that they (defendant's trustees) would have nothing to do with the subscription and that they repudiated it and that the only thing he had been able to do was to get them to take $125,000 and that because it was forced on them, down their throats (Record, p. 168); but there was no meeting of plaintiff's board of directors which at that time consisted of nine directors (Record, p. 165), two of whom, Trenholme and Williams, appear never to have qualified—and there was no ratification at that or any other time by plaintiff or plaintiff's board of the "compromise" of defendant's board of September 5th, and no release by plaintiff or plaintiff's board of defendant from its liability on the subscription in suit.

There the matter rested until April 10, 1907, when defendant's board adopted the following resolutions, to-wit:

Resolved, That this corporation does hereby affirm its subscription to the capital stock of the Northwestern Development Company in the sum of $125,000, par value, and no more, and the attorney of the com-

pany be and he is hereby authorized and directed and required to prepare the necessary notice to be sent by the secretary to the Northwestern Development Company, notifying the said Northwestern Development Company that no subscription to the capital stock of that company was ever authorized in any sum whatever except the $125,000. (Record, p. 107).

and pursuant to that resolution Hartman, then attorney for defendant on or about the same day submitted by letter a form of notice required by that resolution (Dfdt's Ex. 3, Record, p. 107).

On September 18th following at a meeting of defendant's executive committee the following resolutions were adopted, to-wit:

Upon motion, Resolved that this company's proxy be forwarded to Mr. S. W. Eccles to represent this company at a special stockholders' meeting of the Northwestern Development Company to be held at the office of said corporation at 281 St. John St., Portland, Maine, October 3, 1907, at 10 o'clock a. m., said proxy to be given with power of substitution. * * * Upon motion, Resolved that the treasurer of this company be instructed to have this company's stock in the Northwestern Development Company reissued in the name of the Northwestern Commercial Company (Record, pp. 60, 61).

The 25,000 shares of plaintiff's preferred stock together with 25,000 shares of its common stock, represented by the $125,000 paid by defendant, were delivered to and accepted by defendant—but the date of delivery is one of the issues of the case. That date

or the approximate date of such delivery is material for the reasons: first, as it is a circumstance tending to show whether or not there was a repudiation of the subscription in suit; second, because of the express reference to the charter and by-laws contained in the form of the plaintiff's stock certificate and notice thereof to defendant, and third, because the stock delivered to defendant was issued in the name of A. A. Housman & Company and, subsequent to its delivery to defendant, was represented at a meeting of plaintiff's stockholders at Portland, Maine, on January 23, 1907, at which meeting the acts of the incorporators, stockholders, directors and officers of plaintiff in the issue of shares of common stock were ratified and adopted as the valid acts of plaintiff and its stockholders (Ex. D10, Record, pp. 46, 49, 55).

In October, 1908, defendant's then president, Mr. W. R. Rust, received from plaintiff's then president, Mr. E. J. Mathews, a communication with enclosures attached showing the capitalization of plaintiff and the purchase by it from Rosene of the mining properties for $245,000 cash and $3,750,000 in common stock full paid (Rust's deposition, Record, p. 179).

Later in the same month, the two presidents discussed with each other the matter of the profits to plaintiff's promoters in the organization of plaintiff,

the issuance of $3,750,000 common stock to Rosene and Rust then stated that of that amount $2,500,000 was set aside as a bonus to subscribers to plaintiff's preferred stock and the other $1,250,000 was a personal profit to Rosene and his associates (Record, p. 181).

At a meeting of plaintiff's stockholders at Portland on January 10, 1912, the corporate name of plaintiff was changed to Maine Northwestern Development Company (Ex. D11, Record, p. 47; Ex. D3, Record, pp. 44, 70); and at an adjourned meeting of its stockholders at Portland on January 15, 1912, it authorized a compliance with the laws of the state of Washington relative to foreign corporations doing business in that state; and levied assessments or calls upon the unpaid balance of subscriptions to its preferred stock (Ex. D14, Record, p. 47).

On January 19, 1912, plaintiff complied with the laws of state of Washington relative to foreign corporations doing business in that state and the State of Washington issued to plaintiff its license to do business therein (Ex. F. and F1, Record, pp. 56, 57).

On January 22, 1912, plaintiff's board of directors at Seattle levied similar assessments or calls

upon the unpaid balance of subscriptions to its preferred stock (Ex. S1, Record, p. 56); on March 1, 1912, at a meeting of plaintiff's stockholders at Portland, the acts of its stockholders on January 10th and 15th, 1912, and the acts of its board of directors on January 22, 1912, were duly ratified (Ex. D16, Record, p. 48).

Thirty days' notice of the assessments or calls, of the time and place where and to whom payable, was served upon defendant (Ex. S2, S3, T1-3, T4, Record, pp. 57, 62, 63) but defendant failed to pay the same.

On March 13th, 1912, after the assessments or calls on defendant's subscription had become delinquent, plaintiff's board of directors authorized its president to bring suit to collect the same (Ex. T5, Record, pp. 63, 124).

During the trial of the case at bar in the lower court plaintiff tendered defendant in court and deposited with the clerk of the trial court for benefit of defendant, 25,000 shares of its preferred and 25,000 shares of its common stock, full paid, with revenue stamps duly attached and cancelled.

The pleadings forming the issues in the case are:

the amended complaint (Record p. 17),

the amended answer to amended complaint (Record p. 23),

the reply (Record p. 32),

and because of the particular affirmative defenses contained in the amended answer and the new matter by way of estoppel in the reply, a reference to them here will better serve a full consideration of the case than to attempt to summarize them.

SPECIFICATION OF ERRORS.

The errors asserted and intended to be urged are as follows:

First: Because the court erred in sustaining the objection of defendant to the introduction in evidence by plaintiff of a stipulation between the parties to said cause of date May 11, 1914, filed in the above entitled cause May 12, 1914, stipulating for the amendment of the pleadings, to which ruling plaintiff excepted and its exception was allowed by the court: (Second Assignment of Error).

Which stipulation, omitting the title of court and cause, was as follows:

It is hereby stipulated by and between the parties hereto:

1. That the plaintiff's complaint in the above entitled cause may be amended by adding to paragraph X of the original thereof on filed in the above entitled cause, as follows:

"That between the 4th day of April, 1906 and the

9th day of November, 1906, upon payment by defendant to plaintiff of said $125,000, as aforesaid, plaintiff issued to defendant and defendant accepted therefor, 25,000 shares of said preferred stock."

2. That defendant's second amended answer heretofore served and filed in said cause, may be amended by adding to paragraph numbered I of the said second amended answer the following:

"except that defendant admits that between April 4, 1906 and November 9, 1906, plaintiff issued to and defendant accepted, 25,000 shares of the preferred capital stock of plaintiff for the $125,000 which said John Rosene had paid out of the funds of this defendant; and defendant denies that any of said preferred stock was issued to or accepted by defendant otherwise than as hereinabove expressly admitted."

3. That in paragraph numbered I of the second affirmative defense in said second amended answer, the date, "1907" in the first line thereof, be changed to read "1906."

4. That said second amended answer as thus amended, shall be considered and stand as defendant's answer to said complaint as so amended.

Dated Seattle, Washington, May 11, 1914.

William H. Gorham,
Attorney for Plaintiff.

Bogle, Graves, Merritt & Bogle,
Attorneys for Defendant.

(Second Assignment of Error.)

Second: Because the court erred in sustaining the objection of defendant to the introduction in evidence by plaintiff of the minutes of the meeting of the

Executive Committee of defendant of date October 23, 1907, including a resolution as follows:

"Be It Resolved: That Mr. Eccles be requested to call a meeting of the trustees at a very early date, for the purpose of asking for the resignation of President Rosine, or accepting the resignation of the balance of this committee,"

to which ruling plaintiff excepted and its exception was allowed by the court; (Third Assignment of Error).

Third: Because the court overruled the objection of the plaintiff to the following question put by defendant to its own witness, J. D. Trenholme, on direct examination, to-wit:

Q. Did the Board of Trustees of defendant, Commercial Company, at any time ratify any subscription made by Mr. Rosine to the capital stock of the Development Company outside of the subscription authorized at that meeting of September 5, 1906?
to which the witness answered: "They did not," to which ruling plaintiff excepted and its exception was allowed by the court; (Sixth Assignment of Error).

Fourth: Because the court overruled the objection of plaintiff to the following question put by defendant to its own witness, J. D. Trenholme, on direct examination. to-wit:

Q. Did you notify him, or had he been notified, so far as you could tell from your conversation with him, of this action of the Board of Trustees of the defendant company?

to which the witness answered:

A. I met Mr. Davies at the entrance of the

Butler Hotel and we walked into the hotel and sat down there and began talking about the Development Company, and he asked me about the trouble that we are making for Mr. Rosine out here, and he asked me what it was all about and I told him. I told him of the action of our trustees with reference to his subscription. I told him of our action, of the trustees, with reference to this subscription of that $250,000,

to which ruling the plaintiff excepted and its exception was allowed by the court. (Seventh Assignment of Error).

Fifth: Because the court erred in refusing to give the jury instruction No. 16, as requested by plaintiff, as follows:

"The plaintiff had the legal right to issue all of its common stock to John Rosine in part consideration of the conveyance by Rosine to it of certain mining properties and water rights, provided that all of its then stock subscribers and all of the holders of its capital stock then outstanding concurred therein; and if you find that all of plaintiff's common stock was issued to John Rosine for such properties, with the concurrence of all then stock subscribers and all of the holders of its capital stock then outstanding, then I instruct you that such issue was legal; and if you further find that all of the four hundred and ninety-nine thousand, nine hundred and eighty-nine (499,-989) shares thereof alleged by Plaintiff and admitted by Defendant as issued to A. A. Housman & Co. for the benefit of the subscribers to the preferred stock of Plaintiff, there was thereafter by said A. A. Housman & Co. assigned to and is now held by Plaintiff sufficient for Plaintiff to issue and deliver to Defendant one share thereof for each five dollars ($5.00) paid on Defendant's subscription; then I further in-

struct you that such issue and delivery by Plaintiff to Defendant would be in performance of Defendant's subscription. And I further instruct you that the validity of the issue of Plaintiff's common stock in part consideration for the conveyance by Rosine of said mining properties to the Plaintiff would not in the least be affected by the fact that Rosine was making a commission as promoter if that fact was known to all directors of Plaintiff and all of its then stock subscribers and all of the holders of its stock then outstanding and there was no objection made by any of them thereto,"

to which refusal plaintiff excepted and its exception was allowed by the court; (Eighth Assignment of Error).

Sixth: Because the evidence showed that the common stock of plaintiff company, fully paid, was legally issued for a valuable consideration and was delivered as follows: $2,500,000, par value, as a bonus to the subscribers to the preferred stock of plaintiff company, $1,250,000, par value, as a bonus to John Rosine and his associates, promoters of plaintiff company; (Ninth Assignment of Error).

Seventh: Because the evidence showed the fact that $2,500,000, par value, of the common stock of plaintiff company, fully paid, was issued as a bonus to the subscribers to the preferred stock of plaintiff company, and the further fact that $1,250,000, par value, of the common stock of plaintiff company, fully paid, was issued and delivered to John Rosine and his associates, promoters of plaintiff company, as a bonus, were known to defendant in the month of October, 1908, more than three years prior to the commencement of this action; (Tenth Assignment of Error).

Eighth: Because the evidence showed that the

defendant's president reported the subscription in suit and the payment of $50,000 on account thereof out of defendant's funds, at a meeting of defendant's Board of Trustees held at Seattle within two weeks after the making of said subscription, and that upon receiving said report the defendant failed to repudiate the same, failed to notify plaintiff of any repudiation of same, and failed to place the plaintiff in *statu quo;* (Eleventh Assignment of Error).

Ninth: Because the evidence showed that at a time when defendant had acknowledged that $75,000 of its funds had been paid to plaintiff to apply on account of the subscription in suit, to-wit: On September 5, 1906, it further ratified and confirmed said subscription by assuming to ratify and confirm it for the sum of $125,000; (Twelfth Assignment of Error).

Tenth: Because the evidence showed that there was no compromise entered into between the parties releasing defendant from further claim of liability on said subscription, as alleged in the second Affirmative Defense of Defendant's Amended Answer to the Amended Complaint; (Thirteenth Assignment of Error).

Eleventh: Because the evidence showed that plaintiff at all times subsequent to its organization had under its ownership and control a sufficient amount of the common shares of its capital stock, legally issued, for a valuable consideration, to be able to issue common stock, full paid, to all the subscribers in the preferred shares, including defendant, in performance of its subscription contract and the subscription in suit; and that plaintiff tendered into court, for defendant's benefit, 25,000 shares of common stock of plaintiff, legally issued, for a valuable consideration, to comply with said subscription in suit; (Fourteenth Assignment of Error).

Twelfth: Because the evidence showed that the allegations of the amended complaint and of the reply were true, and that the allegations of the amended answer were not true; (Fifteenth Assignment of Error).

Thirteenth: Because the court erred in entering judgment that the plaintiff take nothing by this action, and that this defendant go hence without day and recover its costs; (Sixteenth Assignment of Error).

Fourteenth: Because the court erred in not entering a judgment for plaintiff against defendant in accordance with the prayer of the amended complaint; (Seventeenth Assignment of Error).

ARGUMENT.

The acts and proceedings of plaintiff's incorporators, stockholders and directors in the organization of their corporation, the purposes of its incorporation, its capitalization, classes of capital stock, amount and value of each class, its code of by-laws, the resolution of its board directing the purchase, and the purchase under that resolution, of the mining property, the issuance of $3,750,000 common stock full paid and payment of $245,000 to Rosene, as payment for the mining property, the deposit of $2,500,000 of that common stock full paid with A. A. Housman & Company for the benefit of subscribers to preferred stock of plaintiff and the retention by Rosene as a bonus for himself and his associates, of $1,250,000 of that

common stock full paid, the payment by Rosene on behalf of defendant of $50,000 in April and of $25,-000 in July, 1906, on account of the subscription in suit, the levying of the assessments or calls and notice to defendant thereof are all matters of record and formal proof, and, together with the fact of the subscription in suit by Rosene on behalf of defendant and Rosene's report of that subscription and of the payment in April, 1906 of $50,000 on account of the same, are all facts undisputed by defendant, except as to the bona fides of the valuation by plaintiff's directors of the mining property purchased from Rosene. The legal questions arising from these facts are in dispute.

The action of defendant's board of trustees, both at the April meeting when the subscription in suit was first reported by Rosene and at the meeting in the September following, when, after a discussion of the subscription in suit resolutions were adopted authorizing a subscription to plaintiff's preferred stock in the sum of $125,000 and directing a disposal of the stock held by defendant in plaintiff down to $50,-000, is in dispute and the facts are only to be ascertained from defendant's records and the testimony of the former attorney and former trustees of defendant present at those meetings; of those present, all are

dead except Hartman, former attorney, and Thomsen, Treat, Trenholme and Rosene, former trustees; Rosene, though presiding at that April meeting and called as a witness by defendant was not interrogated as to the action of defendant's board at that April meeting, by defendant, and objection was made by defendant to plaintiff so interrogating him unless plaintiff made him its own witness; why plaintiff did not make him its own witness for the purpose of eliciting the facts with reference to that April meeting will be patent upon the most cursory reading of Rosene's testimony.

The testimony of Thomsen, for the plaintiff, and of Hartman, Treat and Trenholme, for the defendant, is in direct conflict so far as concerns the action of defendant's board at that April meeting.

POINTS AND AUTHORITIES.

I.

The subscription in suit, though its execution and delivery were brought home to defendant's board of trustees within a fortnight after such delivery, was not disaffirmed or repudiated by defendant and thereupon became a binding obligation on the part of defendant. (Fourth and Eighth Specifications of Error).

A repudiation of an unauthorized act of an agent,

by defendant to discredit Thomsen's testimony or to attack his credibility as a witness.

Hartman, former attorney, Treat and Trenholme, former treasurer and secretary and former trustees, of defendant, were called by defendant to explain their own actions as such former officers and attorney.

We are content, after making due allowance for the lapse of memory in the passage of time from 1906 to 1916, to rest the credibility or want of credibility of Hartman, Treat and Trenholme as witnesses, where it must rest, upon their own testimony as to what transpired at defendant's board meeting in September following and as to their reasons for the acts of the board at that meeting; and while it might be desirable to analyze that testimony concerning the September meeting for the purpose of demonstrating now the credibility of the witnesses upon this issue of disaffirmance at the April meeting it will be more orderly to allow it to develop itself when discussing, later in its proper place in this brief that September meeting.

If the resolution of repudiation was formally adopted that would dispose of the matter so far as the April meeting was concerned, except in so far as

such disposition was modified or changed by subsequent acts of defendant.

Assuming there was no such resolution formally adopted, was there such action on the part of defendant's board as was tantamount to the formal adoption of such resolution?

It appears that, at the April meeting, each trustee of defendant, except Rosene, there present, denied the authority of Rosene to bind the defendant by the subscription in suit, each trustee was opposed to having the subscription; but in view of Rosene's statements to that board and the board's acquiescence therein, that he would dispose of the subscription, of the stock represented by it and refund the money, it is fair to require evidence not only of a unison or assent of the minds of the majority of the board but evidence of the "so ordering it," to relieve defendant from liability on the subscription; and the evidence fails to show such "so ordering it."

Thompson, Corp., sec 5219. Note 5.

(b) *Notice of repudiation:* Trenholme, secretary and trustee of defendant, testifies: (A very short time after this April meeting) he met Mr. Davis, president of plaintiff, a member of the firm of A. A. Housman & Company, and a resident of New York, at the entrance of the Butler Hotel in Seattle and they

walked into the hotel and sat down there and began talking about the Development Company and Mr. Davis asked witness about the trouble that they were making for Rosene out here and what it was all about and witness told him of the action of their trustees with reference to the Rosene subscription of $250,000 (Record, p. 105).

Hartman testified that H. C. Davis of New York, was the president of plaintiff at that time, a partner of A. A. Housman & Company; that he thought he saw Trenholme, defendant's secretary, talking with Mr. Davis with respect to this notice at different times when he was here in the summer of 1906; and it was witness' recollection also in the spring of 1907, Davis was around here quite a good deal for quite a good while (Record, p. 82).

The plaintiff's record shows that Rosene was its managing director with full power and authority to take charge of the operation of the company (Ex. D2, Record, p. 42); Rosene was the officer in charge of the operations of the company, mainly carried on at Seattle and Nome. It does not appear from the Record that Davis was present at any time in Seattle on the business of plaintiff or that he transacted, as such president, any business for the plaintiff at Seattle. His home and place of business, both as to the firm of

A. A. Housman & Company and as to the plaintiff was in New York City.

The general rule is that notice of a fact acquired by an agent while transacting the business of his principal operates constructively as notice to his principal. And as a corporation acts or is acted upon only through its officers, this rule applies with peculiar force to corporations.

Thompson, Corp., sec. 5189.

But this rule is subject to the exception, that where the president is totally disassociated from the company's business, as where he is on a journey, notice to him is not notice to the corporation.

10 Cyc. 1059.

We submit that the fourth specification of error is well taken.

(c) *The status quo*: The subscription had been delivered to plaintiff and $50,000 had been paid on account of it, when it was reported with that payment to defendant's board; this amount was credited plaintiff and debited "Investment" account, on the books of defendant (Ex. K1); and was included in defendant's "capital assets" in its annual report for the year ending April 30, 1906, published by defendant to its stockholders; neither when the alleged resolution of

repudiation in April was adopted nor at any time thereafter were cross entries made on defendant's books debiting plaintiff's account and crediting "Investment" account with this item; the item of $50,000 was allowed to remain as originally entered, for all time, and this, notwithstanding Trenholme, secretary of defendant, had supervision of the general affairs of his company and in a general way kept posted from time to time as to the state of the accounts between the company and other parties it was doing business with (Record, p. 106).

A redelivery of the subscription itself was not demanded of the plaintiff but it was allowed to remain in plaintiff's possession until produced in evidence by plaintiff at the trial in this action.

As to what was done about the $50,000 paid at the time of the adoption of the alleged resolution of repudiation:

Trenholme testifies:

Mr. Rosene made the statement that if we did not want that investment he could readily take and sell the amount that he had subscribed for their company and he asked that we make no official record of that meeting for the reason that it might handicap him when he took the matter up again with his New York associates. (Record, p. 104).

* * * (Witness was asked: "What action was taken about that $50,000; what was done about that,"

to which he answered): That Mr. Rosene was to sell that—he was to reimburse them, defendant, even for that $50,000—that amount was to be made good to the Commercial Company. (Record, p. 106).

* * * Mr. Rosene was to dispose of the stock of this subscription and get us back even the $50,000 that he had paid, they were to be reimbursed for that amount. (Record, p. 113).

Hartman testifies:

(After the alleged adoption of the resolution of repudiation) then Mr. Rosene pleaded with the board to not make a record of the matter in the record books because, he said, that even if the board did not think the property valuable, or the prospects valuable or the investment valuable, there was plenty of people who did, and he would have the Company entirely relieved from what he had done and others would take the entire subscription; would return the $50,000 to the treasurer which he had paid and that the Company would not have any obligation out, and if a record was made and the matter was talked about it would lessen his chance of correcting the situation and relieving him from much embarrassment because he would make good by having others take the stock which had been set aside under that arrangement. (Record, p. 80).

* * * It (making a record of the resolution of repudiation) did not impress him of so much importance because of his belief that Mr. Rosene would be able to get the money back and relieve the Company entirely from what he had attempted to do; he believed that he (Rosene) would do it and it seemed like a mere formality and his (Rosene's) explanation was made and when he (Rosene) found they did not want to go on, he (Rosene) would have it placed in another way entirely. (Record, p. 85).

Treat testifies:

That everybody was in favor of it (resolution of repudiation) and it carried; Mr. Rosene then said that the stock had been oversubscribed in New York and it would be much easier for him and it would keep him in better standing with his associates, if they did not take any action that would reflect upon the subscription, and begged them not to do it and assured them that he would let the people who had subscribed in the east take the stock in their stead, and asked them for that reason to leave it off their record and not to make any permanent record of it, and they consented to it, thought that would be the simplest way out of it, so it was not put on the record. (Record, p. 94).

While it is true that where a corporation repudiates promptly the unauthorized act of its president and returns or tenders back its shares, it may maintain an action against the corporation whose stock has been subscribed, to recover what has been paid; in the case at bar the plaintiff manifested an intention to look to Rosene individually and not to the resolution of repudiation to relieve it of the situation and secure a refund of the money paid.

Defendant was acquiescing in Rosene acting as its agent in disposing of the subscription and stock under it and securing a refund of the money.

For it must be borne in mind that in defendant's board meeting, where Rosene was presiding, any assurance Rosene made to which the board assented, was made by Rosene as an individual or in his capacity of president of defendant, and not as an officer or agent of plaintiff; defendant's trustees were charged

with the knowledge that, as a matter of law, Rosene could not, while a member of and presiding at, defendant's board, act in an official capacity for, or bind, the plaintiff in transactions between the two corporations.

And in such acquiescence of defendant in Rosene acting as its agent in disposing of the subscription and the stock represented by it and in securing a refund of the money, instead of relying upon an absolute repudiation and the consequent right to recover the money from plaintiff, the defendant, in view of Rosene's statements, at the time, may have been moved by considerations of self-interest, a desire to shield its own reputation as a going business concern by shielding the reputation of its president; to protect its credit and standing by concealing any breach between its president and the balance of its board of trustees; fear of disturbing the pending negotiations with New York capitalists for the controlling interest in defendant, as evidenced by defendant's minutes, might have moved defendant to waive a repudiation of the subscription and to consent to look to Rosene to dispose of the matter.

Assuming the adoption of the resolution of repudiation, we have a repudiation which would relieve defendant from all liability and operate to give

the defendant a right to demand and recover of plaintiff the money theretofore paid; and then we have the further action on the part of the board consenting to look to Rosene to relieve them of the situation, to dispose of the subscription or stock represented by it and refund the money. The two actions are inconsistent and the latest adopted must govern the situation. Instead of an absolute repudiation, which in itself would relieve defendant, the defendant signifies that it does not want the investment and allows Rosene, its president, to dispose of it in a manner that its money will be refunded and it will be relieved from further liability.

Under such conditions the issuance and delivery of stock under the subscription would be subject to the order of defendant and plaintiff would, as a matter of law, be bound by the subscription in suit in its possession to deliver stock under it to defendant or order. The plaintiff was not placed in *statu quo;* it held defendant's subscription, still a valid and subsisting contract, the disposal of which was, by defendant's action entrusted to the latter's president.

The subscription, although made without authority of the trustees of defendant, having been partly executed by the payment of $50,000, was not void but voidable.

A. & C. Coml. Co. v. Solner, 123 Fed. 855, 9th C. C. A.

And, as in the case of rescinding a contract for fraud, to rescind the subscription the parties must be placed in *statu quo.*

9 Cyc. 437 and cases.

For just and wise reasons the law gives to one who is induced by fraud to make a contract, the option upon discovery of the facts constituting the fraud, to rescind the contract and restore the consideration or to affirm it and recover the damages he has sustained. But it imposes upon him the imperative duty to exercise his option to release the party with whom he has contracted, to restore any consideration he has received which may be restored, and to place the parties as near as may be in *statu quo,* immediately upon discovery of the fraud, if he would rescind or avoid his contract. Nor does it permit him to speculate upon his option, to lie in ambush for years, until changes in the conditions or markets make his interest plain, before he makes his choice. Silence, delay, acquiescence or the use or retention of any of the fruits of the contract for any considerable length of time after discovery of fraud is in itself an exercise of the option and constitutes a complete and irrevocable ratification of the transaction. (Cases). This rule is peculiarly applicable to cases of the character here in question, where the property in controversy is stocks of mining and other like corporations which are speculative in character.

Wheeler v. McNeil, 101 Fed. 685.

If one who is induced to make a trade or sale by fraud would rescind it he must immediately upon his discovery of the fraud announce his intention so to do, and return all consideration he has received, to the end that the parties may be put in *statu quo* before sub-

sequent transactions have made such action impossible. Silence, delay, vacillation, acquiescence or the retention or use of any of the fruits of the sale or trade that are capable of restoration for any considerable length of time after the discovery of fraud, constitute a complete and irrevocable ratification of the transaction.

Stuart v. Hayden, 72 Fed. 402, 8th C. C. A.

We submit that each of the three elements necessary to a repudiation of the subscription was lacking in the case at bar; that there was no action of the board, as such, on the subscription; that even conceding such action, there was no notice to plaintiff; and even conceding such action and notice, the plaintiff was not placed in *statu quo;* and that it necessarily follows, even conceding for the sake of argument that Rosene was without authority in the first instance to make the subscription on behalf of defendant, that the subscription was given validity by the failure of defendant to affirm or disaffirm promptly on knowledge of the subscription being brought home to it; such failure was in law an acquiescence in the act of the agent.

And this is true when any element of disaffirmance is lacking, as the failure to give notice or the failure to place the other party in *statu quo.* We submit that the eighth specification of error is well taken.

II.

The action of defendant's board on September 5,

1906, after fully discussing the subscription in suit, in authorizing a subscription to stock of plaintiff for defendant in the sum of $125,000, was, in legal effect, a ratification of the subscription in suit.

(*Ninth Specification of Error*).

The minutes of defendant's board meeting on September 5, 1906, read as follows:

The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed, and Mr. Thomson introduced the following resolution:

RESOLVED: That the president be authorized to subscribe to the stock of the Northwestern Development Company for this company in the sum of $125,000.

Mr. Thomson moved the adoption of the above resolution and the same being seconded by Mr. A. J. Trimble, the same was put to a vote and unanimously carried.

The following resolution was introduced by Mr. Thomson and seconded by Mr. A. J. Trimble and was unanimously adopted, viz.:

WHEREAS, it was necessary to provide funds to build or purchase additional steamers for the company's use;

RESOLVED: That the president be instructed to sell or dispose of the stock held by this company in the Northwestern Development Company down to $50,000. (Exhibit H, Record, pp. 59, 94).

There had been a credit of $50,000 on the subscription in suit reported by Rosene at the April meeting of defendant's board (Record, p. 66) and a credit of $25,000 on July 15th following (Exhibit 1, Record, pp. 66, 68).

Mr. Trenholme testifies, as to this latter credit that he might have known about it prior to September 5th but did not know it prior to Mr. Rosene's going to Nome (Record, pp. 106-107); that Mr. Rosene went to Nome either the first or second sailing of their steamer, the last of June or the first of July (Record, p. 105), (but Rosene was present at Seattle at the meeting of defendant's Board July 20, 1906—Record, p. 60); that he learned later in the year (than the April meeting), before the September meeting, that there had been an item of $25,000 credited on open account for plaintiff on their books; *not on this subscription;* all he learned about it was just as you see on that memo. (defendant's exhibit 1, Record, p. 113), which read that it *was on the subscription;* it looked that the whole item as shown by the voucher was a credit on the subscription (Record, pp. 113-114); that there was an item similar to the $50,000 already gone into the same channels as that $25,000; there was nothing they could do until Mr. Rosene returned to Seattle (Record, p. 114); on July 15, 1906, plaintiff had a balance

of $75,000 to its credit on defendant's books (Exhibit K1, Record, p. 114).

When asked: "Now, why didn't you charge back this item, if that had been wrongfully credited to them?" Trenholme answered: Why charge it back, that he would not have charged it back until Mr. Rosene came back. (Record, pp. 114-115). Still, he says, he had supervision of the general affairs of defendant, that in a general way he kept posted from time to time as to the state of the accounts between the company and other parties it was doing business with. (Record, p. 106).

With only $75,000 credited on the subscription in suit on September 5, 1906, defendant, to account for its resolution authorizing a subscription in the sum of $125,000, attempted to show:

First: By Hartman and Treat that plaintiff was indebted to defendant for freight and goods in the sum of the difference between the $125,000 and $75,000.

Hartman testifies:

That the $50,000 that was paid in the first instance and which was to be returned by Mr. Rosene under the suggestions and talk in the April meeting, had not been, and more money had been paid to plaintiff; witness thought it was on account of

freight bills and goods sold plaintiff at Nome and things like that. (Record, p. 82).

That it was stated at the meeting of the directors who were there, including Mr. Trenholme, who had supervision of all of the accounts at all times, that in addition to $50,000, $75,000, or thereabouts, more as he recalled, had been added, had been taken out of the defendant's treasury and paid to plaintiff and that they did not see their way clear to get that money back and they had better settle it by taking shares of stock to the amount of $125,000, as that would settle the whole thing and make everybody agreeable in both companies to settle it that way. That was the general plan on which they proceeded, and then a resolution was passed to take those shares and pay for them—the payment having already been made as stated. (Record, p. 82).

Did not know that he (Trenholme) reported at this meeting in witness' presence; it might have been the treasurer, Mr. Treat, as witness remembered—or they had something pending—witness knew there was a lot of freight at one time involved there—that he had the impression that they had a large freight item and stores sold at Nome, because the defendant ran a store at Nome—the defendant, as he recalled, sold merchandise to plaintiff that was operating up in Alaska and they were not paid for it over the counter and this became a matter of debit and credit and the plaintiff had obtained from the defendant a considerable amount of value in the way of freight and goods that was sent up by itself and merchandise they bought and other things, as he recalled the circumstances now; that he believed would put them in debt to the defendant, if they bought and did not pay cash over the counter. (Record, p. 85). His understanding, as he had told counsel, was that that was the amount of the incurred or the incurring liability—ob-

ligation—and he thought it was $75,000. (Record, p. 87).

And Treat testifies:

That they had a general discussion and looked into the accounts of both companies and found the Northwestern Development Company owed the Northwestern Commercial Company such an amount for freight and supplies that if they were to settle upon a $125,000 sum, it would merely square the account and make it satisfactory to both companies and start over again as it were; so the transfers were made; there had been some transfers made in the book without coming up before them—he did not think there was any cash paid for any of the stock; he thought it was merely a question of bookkeeper's transfer and journal entries; that he was the treasurer at that time; that there had not been any cash payments on this Rosene subscription that he knew of; he never knew how it was paid for. All of those things came up at that time. They found there had been entries and cross entries and credits and debits and that by making it $125,000 they could nearly square the accounts and it would seem to be the proper thing to do—a compromise arrangement—and that resolution was passed. (Record, p. 95).

They talked over the amounts and called in the accountants and found that there had been credits for freight and for Nome stores, and so on, he did not think he examined the books personally. (Record, p. 97).

And when asked—"You don't know anything about the actual accounts, do you—one way or the other?" Treat answered: "That he knew there was, approximately, $125,000; that was what was told them at that time; that his recollection was that that there was altogether about that lump sum, $125,000, one

way and another, as he recalled it, so that in their making that $125,000 subscription it would practically square the account. That he thought the debt was largely for freight. (Record, p. 97).

* * * so that, as he understood it, the two items then of $50,000 which had been credited to them originally on the subscription and the $75,000 which they owed for freight principally would make up the $125,000; he thought that was wiping out the freight; he thought that was crediting them instead of charging them—crediting them with the stock and charging them with the freight; he did not know what entries were made; there were a great many entries and cross-entries, he was not a bookkeeper and could not tell; he was treasurer, but he had his man in there; witness never had anything to do actually with it; he did not do it personally; he hired a man to do the work in there as treasurer. (Record, p. 98).

* * * That he could not tell where the freight is charged; could not tell on that ledger account where the freight was charged against the $125,000 that is credited to the company on their subscription; would not want to try, because he was not an experienced bookkeeper. * * * That his impression was that the larger portion of that $75,000, or of the allowance they were making in September to foot up to $125,000 as an offset to the subscription was freight. * * * He would say the most of it was freight. (Record, p. 100).

Second: By Trenholme, that plaintiff was indebted to defendant, not for freight and goods, but on open account on September 5th, in excess of $50,000, which together with the $75,000 previously paid

on the subscription would amount to $125,000 authorized on a subscription.

Trenholme testifies:

That at a meeting of the Board of Trustees, September 5th the question came up as to this subscription to the stock of the plaintiff; at that time they agreed to authorize Mr. Rosene to subscribe for $125,000; at that time the plaintiff owed the $125,000, which included the $75,000 which had been paid * * * Plaintiff had already been given credit for $75,000 on this subscription—it was not on this subscription, the orignial seventy-five was not on the subscription—plaintiff owed that much money to defendant; up until that time defendant did not regard it as a subscription at all; in addition to that plaintiff owed them some $50,000 odd dollars. (Record, p. 106).

* * * That on September 5th this plaintiff company owed them $57,692, which, added to the $75,000 which had been charged against their company and credited plaintiff, would make a little over $125,000. (Record, p. 115).

Trenholme was then asked:

"And it was for the reason that these accounts about balanced in that way, that you said, 'Well, we will take $125,000 of this stock and call it square?'" and answered:

"That might have entered into it, but they decided to take the $125,000 *of that subscription;* that was what they decided to do; their books showed that they had already been paid a certain amount on *the subscription,* so that they decided, after discussing it very, very thoroughly, that they would take $125,000 because they took it up and discussed it and decided

to make it; this controversy was hanging all the summer." (Record, p. 115).

* * * The plaintiff had $75,000 of their money already and perhaps $100,000; plaintiff owed them $57,000 more on open account; decided to dispose of it one way or the other, whether they were going to subscribe or not—they decided to subscribe and authorized him to subscribe. (Record, p. 115).

Witness was then asked:

"Now, why, having only $75,000 invested in this subscription, why raise it $50,000 more and then on the same day authorize a disposal down to fifty?"

And he answered:

"Why do it? It was their way of doing business and then they wanted to sell down to $50,000."

Witness was then asked:

"Why not sell down from 75 to 50 and not put in 50 more?"

And answered:

"Plaintiff owed defendant fifty and defendant wanted to close that account."

Witness was then asked:

"Was that the only reason?"

And answered:

"Well, yes and no, they wanted to close it up and make,—if they were going to do anything, they wanted to make a subscription for the $125,000." (Record, p. 116).

At that time this balance shows it was $57,693; That the balance was struck August 31st and on the

5th of September there was a $40,000 credit. * * * That the balance on August 31 was $57,600; that on September 5th then they had a credit for $40,000; that reduced the balance to the difference between the one item and the other which would be $17,692, on the 5th day of September, 1906. (Record, pp. 118-119).

Thus we have Hartman, confessedly, without any real knowledge of the facts—only impressions (Record, p. 85), and Treat, who "was not a bookkeeper and could not tell; he was treasurer, but he had a 'man' in there and never had anything to do with it, he did not do it personally," (Record, p. 98) who "never knew how it (Rosene's subscription) was paid for," (Record, p. 95), both attempting to show plaintiff indebted to defendant for freight in the sum of $50,000, admitting the $75,000 applied on the subscription, and "wiping out the slate" against plaintiff by a subscription for $125,000.

If it were true that in addition to the $75,000 credited on the subscription in suit, in April and July, plaintiff owed defendant on September 5, 1906, $50,000 on account of freight, and defendant closed this account of an indebtedness of $125,000 by authorizing a subscription for the latter amount, where are the entries in defendant's books? (Exhibit K1). Where is plaintiff on or after September 5th charged with that $50,000 freight item and where is the ac-

count closed by a credit of $125,000 amount of subscription authorized by the resolution of September 5th? They nowhere appear on defendant's ledger account. (Exhibit K1) and no effort is made by defendant to show their ledger account erroneous in any particular—in fact, Rosene testifies that he had "yet the first time to find any incorrectness in them." (Record, p. 168). But in lieu of such entries as we have suggested were necessary to close the matter on the theory of the testimony of Hartman and Treat, we find on Exhibit K1, defendant's ledger sheet, that plaintiff was credited on September 6, 1906, with $25,000 "investment" and on September 25, 1906, with $25,000 "capital stock purchased." These entries and the absence of any entries supporting the statements of Hartman and Treat as to how the account was closed and how the "slate was wiped out" demonstrate to a certainty that the testimony of both Hartman and Treat is without any weight whatever in favor of defendant.

Then we have Trenholme, who understood bookkeeping (Record, p. 120) first denying the item of $25,000 on June 15th was a credit on the subscription, then admitting it, contradicting the statements of Hartman and Treat that defendant was indebted for freight; admitting plaintiff's freight was always prepaid

in cash; but claiming plaintiff indebted to defendant on open account on September 5, 1906, in the sum of $57,693, which, together with the sum of $75,000, former credits credited, totalled an indebtedness of 132,693 $1~~27,693~~, and a closing of the account by authorized subscription for $125,000; and finally being forced to admit that on September 5, 1906, plaintiff was only indebted to defendant on open account in the sum of $17,692. (Record, p. 119); and admitting "that defendant decided to take the $125,000 *of that subscription;* that was what they decided to do; their books showed that they had already been paid a certain amount on the subscription so that they decided after discussing it very, very thoroughly that they would take $125,000 because they took it up and discussed it and decided to make it; this controversy had been hanging all summer." (Record, p. 115).

Finally, we have Rosene's testimony as follows:

"Well, I caused the Northwestern Commercial Company—money and property to be given to the Northwestern Development Company, but without the Commercial Company's knowledge, except my own personal knowledge in each instance, and afterwards of course the directors of the Northwestern Commercial Company decided to ratify my acts, which had been done unknown to them and unauthorized by them, by my making this subscription which was at my pleading and suggestion. (Record, p. 165).

* * * (And referring to the resolution of Sep-

tember 5, 1906, authorizing the subscription in the sum of $125,000).

"In other words, the members of the Board of the Commercial Company acquiesced in what I had already done and expressed it in that form." (Record, p. 169).

Nor can it be said that in picking out of a mass of testimony two statements, one by Trenholme admitting that defendant decided to take $125,000 on that subscription in suit, and one by Rosene admitting that the defendant's Board ratified his acts by his making the subscription, acquiescing in what he had already done, nor can it be said, we repeat, that we are doing violence to the rest of the testimony of these two witnesses. The interest of these witnesses in attempting to screen the defendant from the subscription in suit sprang from self-interest in attempting to screen themselves, chief actors in their several official capacities in the original transactions; and while they did their best, yet in unguarded moments they inadvertently confessed and by that confession made plaintiff's case.

And further showing that the resolution of September 5, 1906, authorizing a subscription in the sum of $125,000 was not authorizing a new and independent subscription, as defendant's minutes (Ex. H)

and the allegations of defendant's first affirmative defense would have it appear, but was an attempted ratification of the subscription in suit to the extent of $125,000, an attempted compromise of the liability of defendant on that subscription in suit:

Hartman testifies:

That they did not see their way clear to get that money back and they had better settle it by taking shares of stock to the amount of $125,000 as that would be a plan to settle the whole thing and make everybody agreeable in both companies, to settle it that way (Record, p. 82);

That he drew the resolution which authorized the subscription for $125,000 (Record, pp. 86, 87);

It was a disagreeable matter for them, that was the way they talked about it and they wanted to get out and be relieved of the situation and the discussion and the embarrassment and the entanglement and with as little loss as possible. (Record, p. 88).

That he presumed that resolution expressed in toto the desire of the board with respect to that subscription of defendant to plaintiff's stock, he couldn't say —that he embodied what as a lawyer he thought carried out the transactions as it was transacted that day before the board as he understood the action; that he put in every element that had any bearing in the question so far as he had remembered. (Record, p. 88).

That resolution was adopted to settle that tangle that they got into, understanding that they wiped the slate as between the companies. (Record, p. 89).

That in that way, the matter could be ended which was then disturbing the officers of the two companies and the two companies and it was sort of a compromise settlement or arrangement finally in the interest of peace and harmony. (Record, p. 89).

That he thought the word "compromise" ought to have been in there; it would have been better, but it was not, it was a compromise arrangement believed for the interest of all the parties and was so stated and recorded and acted upon in that way when they voted on this resolution. (Record, p. 90).

Treat in his testimony characterizes the subscription authorized by the resolution as a "compromise arrangement." (Record, p. 95).

A compromise of any difference or dispute between two corporations on that subscription in suit as a valid subsisting contract would certainly have been in order and, if authorized by the proper authorities of each company, would have been binding upon both.

But what was there to compromise? Rosene had subscribed on behalf of defendant to $250,000 of plaintiff's preferred stock; the defendant had been advised of that subscription at the April meeting of its board and that board had at that time either disaffirmed the subscription and repudiated or by failing to disaffirm and repudiate, had acquiesced and it had become binding upon defendant in the full amount.

And in September, the status was the same—the

subscription was either a valid subsisting contract binding upon the defendant or it was not.

There is no evidence of any condition placed on the subscription, authorized by the resolution, for the sum of $125,000, that defendant should be relieved of liability of all or any part of the subscription in suit; in fact defendant in its pleadings ignores the subscription in suit and contends that it was a new subscription; and there is no evidence that the plaintiff authorized or consented to or ratified any compromise, as such, or that it released defendant from its full liability on the subscription in suit.

A corporation cannot release an original subscriber to its capital stock.

Morgan v. Struthers, 131 U. S. 246.
Upton v. Tribilcock, 91 U. S. 45.

The directors of a corporation have no power to release a subscriber unless expressly granted.

"Every such arrangement is regarded in equity not merely as *ultra vires* but as a fraud upon the stockholders, upon the public and upon the creditors of the company."

Putnam v. R. R. Co., 16 Wall. 390.

And what the directors as a board cannot do, can-

not be done by a part of the directors acting individually.

The evidence shows that Rosene reported the action of defendant's board meeting of September 5, 1906, to Davis, Housman and Henderson, directors of plaintiff, in New York in September, 1906, and it also shows that there was no board meeting called or held at that or any other time to consider the matter. (Test. Rosene, Record. pp. 165, 134, 167, 176).

It was incumbent upon defendant, upon the subscription in suit being reported to it at its April, 1906 meeting, if it desired to disaffirm it, to announce that purpose and *adhere* to it. Its action at its September, 1906 meeting evidenced a playing fast and loose, a vacillation which was fatal to the right of disaffirmance which had before subsisted, whether previously exercised or not.

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of facts, at once announce his purpose and adhere to it. If he is silent and continue to treat the property as his own, he will be held to have waived the objection and will be conclusively bound by the contract as if mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative prop-

erty like that here in question which is liable to large and constant fluctuations in value. (cases cited).

Grymes v. Sanders, 93 U. S. 55.

Ratification or disaffirmance in toto: A leading principle in law relating to this subject is that where a contract is made by one assuming to act on behalf of the corporation and for a purpose authorized by its charter and the corporation, after knowledge of the facts attending the transaction, is brought home to its proper officers, receives and retains the benefit of it without objection, it thereby ratifies unauthorized acts and estops itself from repudiating it. The reason is that it must exercise its option of affirming or disaffirming in whole and not in part; that it cannot disaffirm so much of the unauthorized act as is onerous while retaining so much as is beneficial; that it cannot keep the advantage while repudiating the burden; that it cannot disapprove the contract while keeping the consideration.

10 Cyc. 1078.

We submit that the ninth specification of error is well taken.

III.

Evidence showing Rosene's continuing relation with defendant as its president was admissible as bearing on the question as to whether the subscription was repudiated or not; and its rejection by the court was error.

(*Second Specification of Error*)

It was the contention of defendant in its plead-

ings: That its president Rosene was not authorized to make the subscription in suit and that he had wrongfully and without its knowledge applied $50,-000 of its funds on the subscription in April, 1906, and that notwithstanding that the subscription was repudiated by defendant in April, he had wrongfully without its knowledge applied a further sum of $25,-000 on the subscription in July, 1906, and that on September 5, 1906 such misappropriation by Rosene amounted to the sum of $125,000.

The plaintiff was entitled to have the jury and trial court, in weighing the evidence of defendant in support of these contentions, consider the relations existing between defendant and its president Rosene following their learning of these several misappropriations of its funds; for any continued faith and confidence in him as their chief executive officer, after knowledge of such alleged wrongful acts, would have some bearing as to whether its funds had been so misappropriated and without its knowledge or consent and that would affect the question as to whether or not there had been a repudiation or a new subscription.

The evidence of plaintiff shows that its board on April 12, 1907, by resolution designated an Executive Committee, for the first time, consisting of H.

C. Davis, A. A. Housman and Caleb Whitehead; and at the same meeting by resolution abolished the office of managing director to take effect May 1, 1907, relieved Rosene of his duties as such and directed that he be notified to that effect and be requested to make a full and complete report of all matters and things done and performed by him up to the date of the termination of his office. (Record, p. 78).

The plaintiff desired to show that Rosene was continued as president of defendant until subsequent to October 23, 1907 and for that purpose offered in evidence the minutes of defendant's executive committee of October 23, 1907, as follows:

> "Be it resolved that Mr. Eccles be requested to call a meeting of the trustees at a very early date for the purpose of asking for the resignation of president Rosene or accepting the resignation of the balance of the committee."

These minutes upon being read in evidence were objected to by defendant, the objection sustained by the court and the evidence stricken, to which ruling of the court plaintiff excepted and its exception was allowed. (Record, p. 63).

We submit that the evidence was admissible as proper to be considered on the trial of the cause for the purpose of showing the continuance of Rosene as

defendant's president until subsequent to October 23, 1907, more than a year after September 5, 1906 at which time defendant alleged Rosene had wrongfully and without its knowledge misappropriated $125,000 of its funds.

We submit that the court erred in its ruling and that the second specification of error is well taken and the evidence thus excluded should be considered by this court.

IV.

The conclusion of defendant's witness as to defendant's action with respect to ratifying the subscription in suit, was inadmissible in evidence and the court erred in admitting such conclusion.

(Third Specification of Error)

The defendant asked its witness Trenholme on direct examination the following question:

"Did the board of trustees of defendant, Commercial Company, at any time ratify any subscription made by Mr. Rosene to the capital tsock of the Development Company outside of the subscription authorized at that meeting of September 5, 1906?"

To which question plaintiff objected as incompetent and not the best evidence and calling for the conclusion of the witness; which objection was overruled by the court, to which ruling the plaintiff ex-

cepted and its exception was allowed, whereupon the witness answered: "They did not."

We submit that the trial court erred in this ruling.

What the board did, whether of record or not, was a pertinent inquiry; but the question as framed called for the conclusion of the witness and was objectionable on that ground alone; further it was objectionable on the ground of not being the best evidence; for the minutes are the record of the transactions of the board and the best evidence of those transactions.

We submit the court erred in its ruling and that the third specification of error is well taken and that the answer of the witness should be excluded in the consideration of the case by this court.

V.

Delivery of stock to defendant.

(First specification of error).

It is alleged in the amended complaint: That 25,000 shares of plaintiff's preferred stock were delivered to and accepted by defendant between April 4th and November 9th, 1906, upon payment by defendant of $125,000 on account of the subscription in suit (paragraph XII); and that between the same dates common shares deposited by A. A. Housman & Co. were delivered to the order of defendant under

the terms of the subscription in suit; (paragraph XIII) and that such delivery and acceptance were, from time to time, for payments as they were made by defendant on the subscription in suit (paragraph XIII).

These allegations are denied by defendant's amended answer to the amended complaint.

The approximate date of the delivery of these certificates of the capital stock of plaintiff is material to the issue of the case:

(1st) Because the date of the delivery is a circumstance having a bearing on the question whether or not there was a repudiation of the subscription in suit;

(2nd) Because of the expressed reference to the charter and by-laws in the form of plaintiff's stock certificate (Exhibit C and C1) and notice thereof to the holder;

(3rd) Because the shares of stock delivered to defendant were represented at a meeting of the plaintiff's stockholders at Portland, Maine, on January 23, 1907, at which meeting the purchase from Rosene of the mining property and the issuance of common stock full paid and the payment of $245,000 to Rosene in payment thereof, were ratified and adopted.

The certificates themselves which were delivered to defendant, all issued in the name of A. A. Housman & Co. produced at the trial by defendant at plaintiff's request, are dated and numbered in the order of their issue, as follows:

1906				Shares				Shares
Apr. 2	Pref.,	Cert.	G 37	10,000	Common,	Cert.	G 52	2,000
	"	"	G 38	2,000	"	"	G 53	10,000
	"	"	G 41	3,000	"	"	G 55	3,000
June 9	"	"	F 6	1,000	"	"	F 15	1,000
July 24	"	"	F 7	1,000	"	"	F 24	1,000
	"	"	F 8	1,000	"	"	F 25	1,000
	"	"	F 9	1,000	"	"	F 26	1,000
	"	"	F 10	1,000	"	"	F 27	1,000
Nov. 7	"	"	F 11	1,000	"	"	F 43	1,000
	"	"	F 12	1,000	"	"	F 44	1,000
	"	"	F 13	1,000	"	"	F 45	1,000
	"	"	F 14	1,000	"	"	F 46	1,000
	"	"	F 15	1,000	"	"	F 47	1,000
				25,000				25,000

and all bear an assignment on the back thereof by A. A. Housman & Co. under date September 24, 1907.

These certificates were produced by McMasters, as treasurer of defendant, who testified that when he assumed the office of treasurer the certificates were in New York (Record, p. 63); plaintiff had served notice to produce upon defendant and they had come into his manual possession in July, 1916.

There was no evidence offered by the defendant as to when or where defendant first received them, but the presumption is that they were received on the date of the assignment, to-wit: September 24, 1907. This pre-

sumption, however, is subject to rebuttal, which was offered as follows:

(a) Ex. N, letter on letterhead of defendant, dated Seattle, Wash., April 18, 1906, addressed to Mr. George Henderson (plaintiff's secretary at New York) and signed John Rosene, as follows:

Dear Mr. Henderson:

Will you obtain from the treasurer of the Development Company 12,000 shares of preferred stock, par value $60,000, with an equal amount of common stock, and send same to me by registered mail or express. The interest for this should be made: 50,000 being 20% of Northwestern Commercial Co.'s subscription and 10,000 being 20% of my individual subscription. This to be charged against the money due me from the company on account of the mining property purchased. As you know, there was $245,000 due me from the company on this account, $50,000 of this has already been paid by issue to Mr. Housman of 10,000 shares of preferred stock and an equal amount of common, and after this $60,000 has thus been credited against this account there would still remain due me $135,000 from the Development Co. I simply make this detail explanation so that there shall be no confusion in the interest.

JOHN ROSENE.

Marginal notes on this letter as follows:

G37—10,000 pfd.
G52— 2,000 C
G53—10,000 C
G38— 2,000 pfd. (Record, p. 69)

This letter is suggestive when read in connection with the stipulation of May 11, 1914 (f) below.

(b) Defendant's Exhibit No. 3, offered by plaintiff (Record, p. 181), was a letter from Hartman, attorney for the defendant, to its president, written pursuant to the request of its Board of Trustees of date April 19, 1907, and contains a form of notice to be given its secretary, all as follows:

"Dear Sir:

"I have yours of the 18th in re notice of the Northwestern Development Co. under date April 10th asking for payment of subscription of stock on behalf of the Northwestern Commercial Co. and return herewith the letter. Please have Mr. Trenholme, as secretary, write a letter in form substantially as I will give below and at the same time it will be in order for you to write Mr. Henderson, not as president or (of) our company, but as chairman of the Board of the Development Company to the effect that the Commercial Company is in no way liable for any call upon capital stock, having paid its full subscription.

"As a letter for Mr. Trenholme to write, permit me to suggest the following:

'Mr. Geo. Henderson, Sec'y,

Northwestern Development Co.,

New York City.

"Dear Sir: Your favor of April 10th addressed to the Northwestern Commercial Co., which asks for a payment of 10—10% of the amount of this company's subscription to the capital stock of your company is received. You are aware that this company never authorized any subscription whatsoever, except for twelve hundred and fifty (1250) shares, which has

been fully paid, as evidenced by the certificate of capital stock now held by the Northwestern Commercial Company. The question of the full subscription was discussed at the adjourned annual meeting of the Northwestern Commercial Company on the 10th inst., at that time Mr. John Rosene, chairman of the Board of Directors of your corporation, announced that this company's subscription to the capital stock had been fully satisfied and paid and that there was no further liability, but in order that the matter might be perfectly clear, a resolution was adopted which has been approved by the stockholders, which is as follows:

"'RESOLVED: That this corporation does hereby confirm its subscription to the capital stock of the Northwestern Development Company in the sum of $125,000, par value, and no more, and that the attorney of the company be and is hereby authorized and directed and required to prepare the necessary notice to be sent to the secretary of the Northwestern Development Company, notifying the said Northwestern Development Company that no subscription to the capital stock of that company was ever authorized in any sum or sums whatsoever except the $125,000.'

"This, therefore, is to notify you of the situation and to apprise you of the fact that this company is in no way liable for any subscription called, none having ever been authorized by the trustees or stockholders, other than that which has been fully paid and satisfied.

"A letter on about these lines will fulfill our requirements. Yours truly," (Record, p. 107).

Trenholme testified that that form of notice he gave plaintiff by mail. (Record, p. 107).

Here is an admission by defendant that on April 19, 1907, it had certificates of shares of plaintiff's capital stock; 1250 is the number of shares named in that letter—this was evidently a mistake, the writer of the letter evidently believing the shares were $100 par value (1250 shares, $100 par value=$125,000); whereas, they were $5.00 par value (25,000 shares at $5.00 =$125,000).

(c) On September 18, 1907, the Executive Committee of defendant adopted the following resolutions:

"Upon motion, resolved that this Company's proxy be forwarded to Mr. S. W. Eccles to represent this company at a special stockholders' meeting of the Northwestern Development Company to be held at the office of said corporation at 281 St. John St., Portland, Maine, October 3, 1907, at 10 o'clock A. M., said proxy to be given with power of substitution."

"Upon motion, resolved that the Treasurer of this Company be instructed to have this Company's stock in plaintiff Company reissued in name of Northwestern Commercial Company." (Record, pp. 60-61).

Here is an admission that defendant had certificates of shares of plaintiff's capital stock on September 18, 1907, on which it desired to be represented at a stockholders' meeting of plaintiff at Portland, Maine, to be holden October 3, 1907, and its resolution that its treasurer be instructed to have its stock in plaintiff *reissued* in the name of defendant is evi-

dence, not only that it held these certificates of capital stock in plaintiff, but that those certificates were issued in a name other than that of defendant.

(d) One of the resolutions of defendant's Board of September 5, 1906, reads:

"Resolved, that the president be instructed to sell or dispose of the stock held by this company in the Northwestern Development Company down to 50,000." (Record, p. 94).

It will be observed that the thing to be sold or disposed of by this resolution is not an "investment" or an "interest" in the plaintiff corporation, but "stock held" by defendant in the plaintiff.

(e) The payment of $25,000 by defendant to plaintiff on September 15, 1906, is entered on defendant's journal "capital stock purchased September 15, 1906," $25,000.

(f) In its case in chief plaintiff offered in evidence a stipulation between the parties in this cause dated May 11, 1914, filed in this cause May 12, 1914, which, omitting the title of the court and cause, is as follows:

It is hereby stipulated by and between the parties hereto:

1. That the plaintiff's complaint in the above entitled cause may be amended by adding to para-

graph X of the original thereof in file in the above entitled cause, as follows:

"That between the 4th day of April, 1906, and the 9th day of November, 1906, upon payment by defendant to plaintiff of said $125,000, as aforesaid, plaintiff issued to defendant and defendant accepted therefor, 25,000 shares of said preferred stock."

2. That defendant's second amended answer heretofore served and filed in said cause, may be amended by adding to paragraph numbered I of the said second amended answer the following:

"except that defendant admits that between April 4, 1906 and November 9, 1906, plaintiff issued to and defendant accepted, 25,000 shares of the preferred capital stock of plaintiff for the $125,000 which said John Rosene had paid out of the funds of this defendant; and defendant denies that any of said preferred stock was issued to or accepted by defendant otherwise than as hereinabove expressly admitted."

3. That in paragraph numbered I of the second affirmative defense in said second amended answer, the date, "1907" in the first line thereof, be changed to read "1906."

4. That said second amended answer as thus amended, shall be considered and stand as defendant's answer to said complaint as so amended.

Dated Seattle, Washington, May 11, 1914.

William H. Gorham,
Attorney for Plaintiff.

Bogle, Graves, Merritt & Bogle,
Attorneys for Defendant.

To the admission of which defendant objected and which objection was sustained by the court below, to which ruling of the court plaintiff excepted and its exception was allowed.

The stipulation speaks for itself; only so much of it as is contained in paragraphs 1 and 2 and 4 is pertinent to this argument.

This stipulation was in the nature of an extra-judicial admission, a voluntary and certain written statement of the existence of a relevant matter of fact and as such was competent evidence against defendant by whom it was made, as a fact tending to show the truth of the statement. 16 Cyc. 939.

Although a pleading which has been withdrawn or superseded by amendment is out of the case in its capacity as a pleading and the pleader is no longer concluded by it, relevant statements therein may still be competent as extra-judicial admission; to be so used the superseded pleading must be introduced in evidence; must be shown to have been originally made as a statement of fact and connected with the party himself. 16 Cyc. 971.

A stipulation of counsel as to matters of fact within the scope of their professional function binds the party as a judicial admission, although made before issue joined, and is competent evidence against him, even on a second trial. 16 Cyc. 973.

Exception was urged to the admission in evidence of defendant's original answer in the case, in

which it was in effect, admitted that defendant owned and operated the train which killed the bull in question. But we have no doubt of its admissibility and the admission therein is so far binding upon the defendant as to be conclusive of the fact admitted, unless shown to have been made under a mistake; and no such showing was admitted by the defendant.

O. R. & N. Co. v. Dacres, 1 Wash. 195.

We submit that not only is the presumption that the assignments of these certificates of stock were on the day and date thereof endorsed thereon, overcome by the rebuttal evidence, but that the delivery of the 25,000 shares of preferred stock in plaintiff to defendant between April 4, 1906, and November 9, 1906, was admitted by the stipulation above referred to and that admission is binding on defendant as a fact.

We submit that the ruling of the court was erroneous and that the first specification of error is well taken and that the admission of the defendant, in the stipulation above referred to, should now be considered by this court.

VI.

The allegations of the first affirmative defense in defendant's amended answer to amended complaint.

That the amount of $125,000 of its funds which

had without its authority been applied by Rosene or under his direction as payment on the subscription in suit, were to be applied in payment of the subscription authorized by defendant's resolution of September 5, 1906, of which oral notice was given plaintiff and the moneys were so applied,

are not sustained by the proofs.

The defendant in its pleading is attempting to justify the subscription authorized by its resolution of September 5, 1906, on the theory that that amount of defendant's money, $125,000, had been, without its knowledge or consent, wrongfully applied by Rosene on the subscription in suit (which it is alleged in this first defense was repudiated in April, 1906 by defendant); and in order to recoup itself, subscribed for $125,000 of plaintiff's preferred stock and applied on the latter subscription that equal amount which had theretofore been wrongfully credited to plaintiff on the subscription in suit.

With less than $125,000 alleged to have been wrongfully applied on the subscription in suit, a resolution authorizing a subscription in the full sum of $125,000 would have left defendant voluntarily making a payment in excess of the amount that had been so wrongfully applied, and this would have had the effect of a ratification of the subscription, in suit.

But when it came to proof, defendant was only able to show $75,000 wrongfully applied on the subscription in suit, according to the defense, and attempted to account for the difference between the $125,000 alleged as wrongfully applied and the $75,000 wrongfully applied according to their testimony, as follows:

First: by the testimony of Hartman and Treat that the $50,000 (difference between $125,000 and $75,000) was for freight and goods for which plaintiff owed defendant on Sept. 5, 1906.

Second: By the testimony of Trenholme that plaintiff was indebted to defendant on open account on September 5, 1906, in the sum of $57,693.

The testimony of Hartman and Treat was nullified by the testimony of Trenholme that plaintiff always prepaid in cash its freight and their company always did its business on a simple cash basis; and was further nullified by the absence of the necessary entries on defendant's books to support their statement that plaintiff's account was closed, the "slate wiped out" by charging plaintiff with the $50,000 freight and goods, and crediting plaintiff with $125,000 on account of the subscription authorized by the resolution of September 5, 1906.

Even assuming for the sake of the argument, the $75,000 wrongfully credited on the subscription in suit prior to September 5, 1906, and a further indebtedness of plaintiff to defendant in the sum of $50,000 for freight and goods on September 5, 1906, a total indebtedness on the latter date by plaintiff to defendant of $125,000, the credit extended plaintiff for freight and goods, whether entered on defendant's books or not, was voluntarily given else there would have been no such item (for it is not claimed by defendant that plaintiff defaulted by misrepresentation or otherwise in the amount alleged to be due to defendant for freight and goods); and defendant, by its own testimony, was voluntarily applying this item of $50,000 for freight and goods on the subscription under the resolution of September 5, 1906 and not because that item had previously been wrongfully applied out of defendant's funds to the subscription in suit.

The testimony of Trenholme on this point was nullified by his own admission finally drawn from him that the balance due the defendant by plaintiff on September 5, 1906, was $17,693.

So in no event, by any of the defendant's proof, is it made to appear that more than $75,000 of defendant's funds were wrongfully applied on the sub-

scription in suit; and on the other hand taking either the testimony of Hartman and Treat or of Trenholme, it affirmatively appears that defendant was voluntarily applying $50,000 on the subscription to plaintiff's stock in the sum of $125,000.

So much therefore of this first affirmative defense as alleges misappropriation or wrongful application without the knowledge or consent of defendant, to the extent of $125,000 prior to September 5, 1906 or at all, as a credit on the subscription in suit and the application of that amount so wrongfully applied on the subscription under the resolution must fall, for want of evidence to support it.

VII.

The allegations of the second affirmative defense in defendant's amended answer to the amended complaint:

That on September 5, 1906, defendant learned that Rosene without its knowledge or consent, had applied $125,000 of defendant's funds on the subscription in suit, and that defendant having claim against or right to recover from, plaintiff in that sum, the plaintiff agreed orally to waive and release and did waive and release and discharge defendant from liability to plaintiff and from any further claim by plaintiff against defendant on the subscription in suit,

in consideration of the oral waiver and release by defendant of its right and claim to recover the sum of $125,000 so turned over to plaintiff out of defendant's assets are not sustained by the proofs.

(Tenth Specification of Error)

In the first place such a defense is inconsistent with the first affirmative defense that said sum of $125,000, so wrongfully applied out of defendant's assets to plaintiff, was applied by defendant on a subscription, in like amount, authorized by defendant's resolution of September 5, 1906.

Certainly defendant could not use the same $125,000 which it claimed plaintiff owed it, first, as consideration for the subscription and purchase of an equal amount of plaintiff's preferred stock, and second, as a consideration for mutual release and discharge between these two corporations, defendant releasing plaintiff of defendant's claim and right to recover that amount wrongfully applied as aforesaid, and plaintiff waiving and releasing defendant of any liability of defendant to plaintiff or further claim on the subscription in suit.

In the second place, for reasons given in the Point VI of this brief, immediately preceding, not more than $75,000 of defendant's funds were ever

wrongfully applied, without knowledge or consent of defendant, to the subscription in suit; any amount in excess of that $75,000, applied on the subscription under the resolution of September 5, 1906, would be a voluntary application by defendant of its own funds or credits, according to defendant's proofs.

The second affirmative defense must for these reasons fall, for want of evidence to support it.

We submit that the tenth specification of error is well taken.

VIII.

Fraud—Breach of Fiduciary Relation.

(Seventh Specification of Error).

It is alleged in defendant's first affirmative defense to its amended answer in substance: That Rosene, with others as promoters of plaintiff, and as owners of certain mining properties in Alaska, of little value, agreed that title to said properties should be conveyed to Rosene and by Rosene to plaintiff and that Rosene receive therefor from plaintiff $245,000 cash in full payment for said properties; and that $1,250,000 of plaintiff's common stock should be issued, ostensibly as part payment for the properties, but in reality as a bonus to Rosene and other promoters of plaintiff, and it was further urged as part

of the arrangement that Rosene should provide money to be paid for the property by subscribing to defendant's preferred stock in the amount of $250,000 on behalf of defendant and that the money realized on said subscription should and would be appropriated to the payment to Rosene of said $245,000 under said agreement; that the subscription in suit was made and accepted by plaintiff pursuant to said agreement of Rosene with plaintiff and said promoters and in furtherance of his personal interest and the interest of said promoters and not otherwise; that plaintiff, after its organization, and its officers and directors, had full knowledge of the facts, understandings and agreement above set out and became a party thereto and the subscription in suit was accepted by plaintiff with knowledge of all the facts above set out; and pursuant to said agreement common stock was issued by plaintiff to the promoters, and the defendant did not authorize the subscription in suit, and was ignorant of the secret understandings above set out until 1910 or 1911. (Record, pp. 24-25).

The evidence shows that the original owners of the mining properties were paid $245,000 for its conveyance to Rosene by Rosene and his associates and that Rosene in turn conveyed to plaintiff for $245,000 cash and $3,750,000 in common stock, full paid, of

plaintiff, of which $1,250,000 of common stock was issued to Rosene and retained by him and split up between himself, French and Housman, promoters of plaintiff, as a bonus.

The validity of the issuance of $3,750,000 common stock including the $1,250,000 thereof bonus to Rosene, we have discussed under another point in this brief, under the heading "Bonus Stock."

We are now only concerned with the allegations of the first affirmative defense constituting a breach on Rosene's part of the fiduciary relation existing between him and defendant.

At the time the subscriptions to plaintiff's preferred stock were informally allotted, a Mr. Myers of London, was to pay $25,000 flat for an option on half of the stock, that is, on $2,500,000 stock; and Mr. Farquhar was to take $250,000. Rosene for defendant $250,000, A. A. Housman for himself $50,000 and Rosene for himself $50,000. (Test. Rosene, Record, p. 129).

Housman, Myers and Rosene, by the use of $50,000 from Housman, $50,000 from Rosene and $25,000 from Myers, made up a pool—and Rosene on March 15, 1906 paid McConnell, holding title to the mining properties, for the conveyance from McConnell, $93,-

000 cash and gave him his (Rosene's) personal note for $100,000. (Record, pp. 130, 163).

Defendant did not offer any evidence supporting the allegations of its first affirmative defense that the money to pay the original owners for the mining properties purchased by the plaintiff, was to be provided by defendant or that any of the money realized on the subscription in suit was applied in payment to Rosene of $245,000 cash paid on plaintiff's purchase price, or that the subscription in suit was ever made by Rosene or accepted by plaintiff pursuant to any agreement or secret understanding between Rosene and the other promoters and the plaintiff, its officers and directors.

The money realized on the subscription in suit was as follows:

1906		
April	$50,000	
July 15th	25,000	
Sept. 6th	25,000	
Sept. 15th	25,000	
		$125,000

Of plaintiff's preferred stock subscribed, there was paid for and issued, $1,699,450 par value. (Exhibit N2, Record, p. 72).

Between April 18th and August 31st, 1906, defendant had handled account of disbursements for and

on behalf of plaintiff through its accounts, at least $400,000 (Test. Trenholme, Record, p. 108).

The payments to McConnell and others as original owners of the mining properties were all in 1906 as follows:

February 7th to French	$20,000	
March 15th to McConnell	93,000	
April 2nd to McConnell	20,000	
May 31st to McConnell	20,000	
June 1st to McConnell	24,000	
June 22nd to French	6,000	
June 1st to French	20,000	
June 1st to French	10,000	
May 29th to French	1,700	
May 14th to French	20,000	
August 15th to French	10,000	
		$244,700

(Test. Rosene, Record, pp. 163, 164).

Whatever breach of fiduciary relation on Rosene's part there was arose solely from the fact that Rosene received a bonus of $1,250,000 common stock to be split up between himself, Housman and French, as promoters of plaintiff, for whose preferred stock he subscribed on behalf of defendant the sum of $250,000, defendant alleging ignorance of the bonus to the promoters.

The charter and by-laws of plaintiff both ex-

pressly contemplated the purchase of the mining properties for $245,000 cash and issue of $3,750,000 common stock to Rosene.

The defendant as a stockholder is charged with knowledge of plaintiff's charter and by-laws.

A stockholder is chargeable with notice of its by-law.

1 Cook, Corp. 6th ed., Sec. 4a, p. 27.
citing

Richardson v. Devine, 193 Mass. 336;

Cummins v. Webster, 43 Me. 192, 197.

The by-laws of a corporation may operate as a contract among its members, and they are generally presumed to have notice of them.

5 Thomp., Corp., Sec. 5987.

This is a legal presumption, conclusive in its nature.

I Thomp., Corp., Sec. 941.

Direct proof of notice of its by-laws is not required.

Id.

That this breach of fiduciary relation, if there were such a breach, was first known, not as the defendant alleges in its first affirmative defense, in the

year 1910 or 1911, but in October, 1908, more than three years before the commencement of this action on March 29, 1912, is shown by statements of the presidents of plaintiff and defendant at that time.

Mr. W. R. Rust, in his deposition, states: That about October 6, 1908, at Seattle, as defendant's president, he received, by mail or private delivery, a letter, dated October 5, 1908, addressed to defendant, signed by Mr. E. J. Mathews, as plaintiff's president, with two printed enclosures (copies of letter and enclosures attached to his deposition); that thereafter and during the month of October, 1908, at Seattle, as defendant's president, he personally acknowledged receipt of that letter and enclosures to Mr. Mathews as plaintiff's president, at which time the original capitalization of plaintiff, including the purchase by it from Rosene of the mining properties for $245,000 cash and $3,750,000 common stock, paid up, as set out in the enclosures to the letter above referred to was called to his attention and discussed between them. (Record, pp. 178-179).

Mr. E. J. Mathews, for plaintiff, testifies that he was president of plaintiff from July, 1908, to January, 1910 (Record, p. 179); in October, 1908, possibly in September also, he discussed with Mr. Rust, president of defendant, the matter of the com-

mission or profits to the promoters of plaintiff and the question of the issuance of $3,750,000, par value, common stock of plaintiff to Rosene; and Mr. Rust stated that of that amount $2,500,000 was set aside as a bonus to subscribers to plaintiff's preferred shares and the other $1,250,000 was a personal profit to Mr. Rosene and his associates. (Record, p. 181).

Knowledge of these facts by defendant is specially pleaded in plaintiff's reply to defendant's amended answer.

We submit that the 7th specification of error is well taken.

IX.

BONUS STOCK.

(Fifth, Sixth and Eleventh Specification of Error).

The fifth affirmative defense in effect alleges:

That plaintiff was organized by Rosene et al, as promoters who, in order to secure the common stock as a bonus or gift and without payment of any money and receipt by the corporation of any property, services or other thing of value as a consideration for the issuance of the common stock and contrary to law and public policy of the State of Maine, the domicile of plaintiff, entered into a scheme or device whereby Rosene et al, owning mining property which they ageed to sell to plaintiff when organized, for $245,000, arranged and agreed between said promoters and officers and directors of plaintiff that said property

was to be conveyed to plaintiff for the ostensible consideration of $245,000 *cash and* $3,750,000 *common stock full paid, although the real consideration was* $245,000 *cash; this cash consideration to be paid by plaintiff to* ***Rosene*** *for the owners of the property and* $3,750,000 *common stock to be issued to* ***A. A. Housman & Company,*** $1,250,000 *of which to be delivered to* ***Rosene*** *et al, as a bonus and the remainder of* $2,500,000 *to be delivered by* ***A. A. Housman & Company*** *to subscribers to preferred stock of plaintiff as they paid their subscriptions* (***Par. II.***)

That the common stock was issued by plaintiff to ***A. A. Housman & Company*** *and never issued to the vendors of said property.* (***Par. III.***)

That the property was of little if any value and not considered by vendors nor by plaintiff nor its officers or directors as having actual or speculative value in excess of $245,000 *and was not at any time valued by plaintiff or its directors in good faith in the exercise of their honest judgment in any case in excess of* $245,000 (***Par. IV.***)

That the directors at the time of issuance or authorizing the issuance of said stock and purchase of said property had been selected and controlled by ***Rosene*** *et al., acted in their interest and under their control and had no personal knowledge of said property or its value and if they pretended to make any valuation of the same they acted wholly under the direction and control and in the interest of said promoters and exercised no independent judgment and did not in fact make any bona fide valuation of said property.* (***Par. V.***)

That plaintiff has never had under its ownership or control so as to be able to issue or cause to be issued to defendant in performance of the subscription

contract, any shares of common stock for which par value has been paid in money or labor or property, either of an actual value equal to not less than par or at a valuation not less than par made in good faith by the directors of plaintiff; but that the common stock proposed and offered in the amended complaint has been or will be illegally issued under and pursuant to said fraudulent scheme and device and for no consideration to plainitff or else for alleged labor or property at a valuation by plaintiff's directors not fixed in good faith and known by plaintiff and its directors to be excessive and beyond any fair valuation of such labor or property. (Par. VI.)

A detailed statement of the facts, with reference to pages of the Record, is contained in Statement of the Case in this brief at pages 1 to 29 and reference is here made thereto instead of repeating the same here.

The facts are substantially as follows:

The plaintiff was on March 17, 1906 incorporated under the Corporation Laws of Maine, R. S. 1904, Sec. 50 of Chapter 47 of which provides as follows:

Any corporation may purchase mines, manufactories, and other property necessary for its business, and the stock of any company or companies owning, mining, manufacturing or producing materials or other property necessary for the business, and issue stock to the amount of the value thereof in payment therefor, and may likewise issue stock for services rendered to such corporation and the stock so issued shall be full paid stock and not liable to any further

call or payment thereon, and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased or services rendered, shall be conclusive.

In February, 1906, Rosene secured an option on mining properties, purchase price $245,000, and resold the properties to the plaintiff corporation, of which he was one of the promoters, for the consideration of $3,995,000, as follows: $245,000 cash and $3,750,000 in 750,000 shares of common stock, par value $5.00 each, issued full paid and non-assessable to Rosene; Rosene transferred 500,000 shares of that common stock to a trustee for the benefit of the subscribers to plaintiff's preferred stock and absorbed the balance, to-wit: 250,000 shares as a bonus to him and his associates as promoters; a remnant of the 500,000 shares of the common stock, deposited with the trustee, at the commencement of this action remained on hand, to-wit: 160,099 shares of common stock for the benefit of subscribers to preferred stock, and out of this remnant plaintiff tendered to defendant in court, during the trial of this action, 25,000 shares common stock (together with 25,000 shares of preferred stock) to comply with the subscription in suit.

On March 20, 1906, the time plaintiff authorized the payment of $245,000 and the issuance of 750,000 shares of common stock, full paid, the directors act-

ing unanimously and so authorizing the transaction, were, together with Rosene, owners and holders of all of the stock subscribed or issued, and on March 29, 1906, at a stockholders' meeting at which all of the stock subscribed or issued was represented, the acts and proceedings of the directors as above were unanimously ratified and confirmed.

The corporation was incorporated for the express purpose of acquiring the properties for the consideration named, with a capital stock of 500,000 preferred shares and 750,000 common shares, all of the par value of $5.00 per share; and at the first meeting of the subscribers to the stock a code of by-laws was unanimously adopted containing the same provision for the acquiring of the properties for the consideration named.

The directors at the time of the purchase formally declared it the judgment of the Board that the properties were necessary for the business of the corporation and that the value of $3,995,000 was fair and reasonable.

At the time of the transaction the reports of reliable and competent mining experts showed not less than $50,000,000 of gold in the mining claims and the statement of that valuation in those reports was at that time believed by Rosene.

The question stated: Was the issue of the 750,000 shares of common stock, full paid and non-assessable, under the conditions and circumstances outlined above, legal?

The Law: The issuance by corporations of bonus stock to promoters has been prolific of much litigation in state and federal courts. We do not propose to enter at length upon a discussion of all of the decisions and attempt to reconcile or distinguish the one with or from the other.

The law applicable to the facts of this case has been settled by the Supreme Court of the United States in the case of *Old Dominion Copper M. & S. Co. vs. Lewisohn,* 210 U. S. 206; and that law so settled is at variance with the law as settled by the state courts of at least Maine and Massachusetts.

The Old Dominion Copper M. & S. Co. was a New Jersey corporation, incorporated July 8, 1895 (136 Fed. 195). The law of New Jersey in 1895 relative to the issuance by a corporation of its stock for property is as follows:

Sec. 213. That the directors of any company incorporated under this act may purchase mines, manufactories or other property necessary for their business, or the stock of any company or companies owning, mining, manufacturing or producing materials or other property necessary for their business,

and the stock so issued shall be declared and be taken to be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payments under any of the provisions of this act; and said stock shall be legibly stamped upon the face thereof "issued for property purchased" and in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact.

General Statutes of New Jersey 1709-1895, published under authority of the Legislature by virtue of an act approved April 4, 1894 and a supplemental thereto approved March 20, 1895. Jersey City, N. J., Frederick D. Linn & Company, 1896.

The history of the Old Dominion Copper M. & S. Co. litigation arising out of the issue of bonus stock, conducted in Massachusetts to the court of last resort in that state and in the federal courts to the Supreme Court of the United States, is found in the Reports as follows:

In the federal courts:

U. S. Circuit Court, Feb. 24, 1905, 136 Fed. 915;

U. S. Circuit Court, Nov., 1905, (see 195 Fed. 638);

U. S. Circuit Court of Appeals, Dec. 4, 1906, 148 Fed. 1020;

U. S. Supreme Court, May 18, 1908, 210 U. S. 28;

U. S. Circuit Court, Dec. 1, 1911, 195 Fed. 637;
In the state courts of Massachusetts:

Supreme Judicial Court, Jun. 20, 1905, 188 Mass. 315, 74 N. E. 653; Sept. 4, 1908, 199 Mass. 488, 86 N. E. 660; Sept. 4, 1909, 203 Mass. 159, 89 N. E. 193.

Lewisohn and Bigelow, promoters of that corporation, lived the one in New York and the other in Massachusetts, and as it was impossible to obtain service upon Bigelow in New York or upon Lewisohn in Massachusetts, four actions were begun, two against Bigelow in Massachusetts and two against Lewisohn in New York—these were four Bills of Equity, each of them stating in exactly the same language the facts upon which legal relief was demanded, the only difference between the four bills being in the prayer for relief and the names of the defendants. The facts alleged were: That Lewisohn and Bigelow were promoters of and organized, July 8, 1895, the complainant company, owning all of the forty shares nominally subscribed in the preliminary organization. Upon organization, Lewisohn and Bigelow were elected directors; they had previous to July 11, 1895, become owners of mining property of the value of not to exceed $5,000; on that day the directors of the corporation, Lewisohn and Bigelow, and their dummies on the board under their control, sold and conveyed

to the corporation the mining property for 30,000 shares of its capital stock at the par value of $25.00 per share; the prayer of the Bill was that the sale of the mining claims be rescinded, the property reconveyed and the shares of stock returned, or an accounting had therefor, or the alternative of rescission, the court to ascertain the amount of damage suffered by complainant and decree therefor.

(Statement by Judge LaCombe, 136 Fed. 915).

On the demurrer to the bill in the United States Circuit Court, Judge LaCombe said:

"Whether the contract for the sale of the real estate was voidable, so as to give the corporation the right to rescind or to demand damages, must be determined under the conditions which existed when it was made. Ordinarily, when a director or promoter contracts to sell property to his corporation, the corporation not being independently represented, it may rescind the contract, upon the theory, of course, that the relation between the parties is fiduciary, and that the other stockholders and subscribers to the stock are to be protected against an abuse of trust. But where there are no other stockholders nor subscribers, there is no one who is deceived, no stockholders or subscriber who is defrauded, since all the profit put into one pocket by the "faithless" directors is taken out of their other pocket as the sole stockholders. This principle is abundantly established by decisions controlling here, so it will be unnecessary to cite numerous authorities from other courts. In *Foster v. Seymour,* (C. C.) 23 Fed. 65, which was decided in this court (Wallace, J.), the facts were very similar, except that the

sale was for scrip, the stock not having yet been issued. The court said: 'There was no fraud on the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there were of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each.' And it held that whether or not a subsequent purchaser of stock could recover against those who had misled him—against the corporation or the trustees—'the corporation has no cause of action against the trustees.' Subsequently the same question came before the Court of Appeals in this circuit (*McCracken v. Robison*, 57 Fed. 375, 6 C. C. A. 400), where, as the court expressed it: 'When they entered into the contracts they owned the corporation and all its stock, and represented only themselves. While directors in fact, they were principals in name.' It was held that in such a case the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of their beneficiaries had no application. The demurrer to the bill is well taken, and it is therefore unnecessary to discuss the special demurrer as to defect of parties. The bill is dismissed, with costs.

On appeal, in the United States Circuit Court of Appeals, for the 2nd Circuit, the decree sustaining the demurrer to the bill was affirmed in 148 Fed. 1020, where the decision *per curiam* is as follows:

The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by

Bigelow and Lewisohn to the company, Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it. It cannot be deceived or defrauded, unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew, and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them. It may be that such a large over-capitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock; but we are not now dealing with the case of a stockholder alleging concealment, fraud, and misrepresentation.

Upon a Writ of Certiorari to the Circuit Court of Appeals, 2nd Circuit, the Supreme Court of the United States in affirming the decrees below, said:

"At the time of the sale to the plaintiff then there was no wrong done to anyone. Bigelow, Lewisohn and their syndicate were on both sides of the bargain and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. (Cases.) If there was a wrong, it was when the innocent public subscribed. But what one would expect to find if a wrong happened then would not be that the sale became a breach of duty to the corporation *nunc pro tunc,* but that the invitation to the public, without disclosure, when acted upon became a fraud upon the subscribers from an equitable point of view accompanied by what they might treat as damages."

In the case at bar, the wrong, if any, perpetrated

on defendant, as was said by the United States Supreme Court as just quoted, would not be that the sale by Rosene to the plaintiff became a breach of duty to the plaintiff corporation *nunc pro tunc,* whereby the issue of the stock was invalidated, but that the invitation to the public, that is, to the defendant, without disclosure, when acted upon, became a fraud upon defendant as a subscriber.

Defendant's remedy against plaintiff under such conditions would be for damages for fraud and misrepresentation; and in an action against the defendant, on the subscription it was invited to make, its defense would be fraud unless estopped by reason of laches or ratification.

We have discussed elsewhere in this brief the effect of estoppel by ratification on the part of defendant, as well as laches after discovery of fraud, but those questions are not now before us, the sole question under this point being as to the validity of the issuance of the bonus stock.

It is beside the question to urge that the state courts, including the court of last resort of the state of Maine, in passing on the Maine statute, have determined this matter differently.

The U. S. Supreme Court in the case of *Old Do-*

minion Copper M. & S. Co., supra, rendered its opinion after the Supreme Judicial Court of Massachusetts had spoken and declined to be governed by that state court.

What was said by Judge Hough, presiding in the U. S. Circuit Court, S. D. New York, in *Old Dominion Copper M. & S. Co. v. Lewisohn,* 195 Fed. 637, when urged to follow the state court ruling, is applicable here: This court owes not only great respect as do other tribunals (to the U. S. Supreme Court) but also—what is much more important—absolute obedience.

This court, in *Min. Co. v. Bank,* 95 Fed. 23, has assented to the doctrine we are contending for by citing approvingly *McCracken v. Robison,* 57 Fed. 375, (C. C. A., 2nd Circuit) to the effect: That directors who own all the stock of a corporation are not within the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of the beneficiary, and such a contract, made in the name of the corporation by the unanimous consent of the directors, is not invalid, as against public policy.

Instruction No. 16 requested by plaintiff and refused by the court below, embodies the law on the issue of bonus stock as applied to the facts in the case at bar as settled by the U. S. Supreme Court; and,

in the absence of other instructions covering that law, it was error and prejudicial to plaintiff for the court to refuse that request. For that reason we submit that the fifth specification of error is well taken.

There was 750,000 shares of common stock, of which 500,000 shares were transferred to a trustee for the benefit of subscribers to the preferred stock. Whatever part of the preferred stock, total 500,000 shares, was issued and paid for, an equal amount of the common stock was delivered by the trustee to the preferred stock-subscribers. The preferred stock-subscribers would there get just the same share or proportion of the whole capital stock of plaintiff where there was a bonus of one share of common to each share of preferred paid for, as though there were no common stock at all.

The issue of common stock to the amount of 500,000 shares therefore was valid, irrespective of the value of property conveyed therefor, because it was only issued in trust for those subscribers to preferred stock. The excess of the issue, to-wit, 250,000 shares, which went to Rosene and his associate promotors, whether legal or not, does not affect the question raised by this fifth affirmative defense, which is the validity of the 500,000 shares of common transferred to the trustee for the benefit of preferred stock-sub-

scribers, because it is out of the remnant of this trustee stock that the tender of common stock was made in the court below by plaintiff to comply with the terms of the subscription in suit.

We submit that the issue of 750,000 common shares, full paid, as bonus stock was legal; and that the common stock tendered defendant in this action in the lower court, a part of that issue of 750,000 shares, was legally issued and that the tender was in full compliance with the terms of the subscription in suit.

We submit that the sixth and eleventh specifications of error are well taken.

X.

Ratification by Defendant—Estoppel.

The Transfer Books of plaintiff (Ex. E11/14) show that the 750,000 shares of common stock issued on March 30, 1906, to Rosene for the mining property, were issued on April 2, 1906, as follows:

To Rosene	250,000 shares
"	3 shares
Directors to qualify..............	8 shares
A. A. Housman & Co............	499,989 shares
	750,000 shares

At a meeting of plaintiff's stockholders on January 23, 1907, at Portland, Maine, Rosene as stock-

holder of 250,003 shares and A. A. Housman & Co., as stockholders of 768,149 shares, common and preferred, were represented by proxy (Ex. D10, Record 46).

The Transfer-Books of plaintiff show that on January 23, 1907, the common and preferred shares issued and outstanding in the name of Rosene totalled 250,003, and that the common and preferred shares issued and outstanding in the name of A. A. Housman & Co. totalled 768,149; and that of the 768,149 shares, common and preferred, in the name of A. A. Housman & Co., the common and preferred shares issued and dated on page 64 of Record produced by defendant in court at the trial (Record, pp. 63, 64) were a part.

At that meeting on January 23, 1907, all shares represented being voted in the affirmative and none in the negative, the acts of the incorporators, stockholders, officers and directors in the issuance of plaintiff's common stock, were in all respects ratified, approved, confirmed and adopted as the valid and binding acts of the plaintiff and its stockholders. (Ex. D10, Record, p. 49).

Of this stock issued and outstanding on January 23, 1907, in the name of A. A. Housman & Co., 25,000 common and 25,000 preferred were owned and held

by defendant, with A. A. Housman & Co., as nominal owners, in trust for defendant.

The principles of a resulting trust where personal property is purchased by one person and taken in the name of another, apply to shares of stock in a corporation.

Creed v. Bank, 1 Oh., St. 1.

The trustee is entitled to vote in respect of stock standing in his name, as trustee of others, and for equally good reason when the trust is not disclosed on the books of the corporation.

10 Cyc. 334 and cases.

The right to vote follows the legal title to the shares.

10 Cyc. 332.

Nor can it be said that the issuance of a proxy by the trustee is a delegation of the trust.

1 Perry on Trusts, Sec. 409.

Where a stockholder participates in the ratification of the issuance of common stock of the corporation, it is estopped from questioning the validity of the issue.

2 Clark & Marshall, on Priv. Corp., Sec. 398.
Washburn v. Paper Co., 81 Fed. 17;

Wood v. Water-works Co., 44 Fed. 146, cited approvingly by this court in *Min. Co. v. Bank*, 95 Fed. 23, at pp. 30 and 34.

The ratification relates back and is equivalent to an antecedent authority.

10 Cyc. 1083,

Fleckner v. U. S. Bank, 21 U. S. 338.

As a stockholder of plaintiff defendant was charged with knowledge of plaintiff's by-laws, including by-law No. 25 (Statement of Case, page 6 of this brief) and is bound by their terms. By-law No. 26 expressly provides for the issuance to Rosene of the common stock full paid in part payment of the mining properties purchased from him; and further provides that no arrangement or contract made on behalf of plaintiff with any director or officer of plaintiff shall be rendered void or voidable by reason of the fact that such officer or director is interested in such contract, and that every present and future stockholder assents to the terms, conditions and circumstances under which the mining properties have been acquired and the shares of common stock issued.

Knowledge of by-laws and notice thereunder to defendant and estoppel by ratification were specially

pleaded by plaintiff in its reply to defendant's amended answer.

XI.

The fourth affirmative defense that the right of action of plaintiff herein did not accrue within six years prior to the commencement of this action, is not sustained by law or facts.

The subscription in suit was made not earlier than April 3, 1906; that was the date of the telegram from Rosene to A. A. Housman, treasurer of plaintiff, at New York authorizing the subscription (Ex. E3, Record p. 50); the subscription itself as executed by Rosene on behalf of defendant was mailed by Rosene to A. A. Housman from San Francisco, April 4, 1906 (Exhibits E1 and E2, Record pp. 50, 53, 54, 77).

This action was commenced in the court below on March 29, 1912 (Record p. 1).

The statute did not begin to run on the subscription in suit until a call was made under it.

Thompson, Corp. Secs. 2002, 2003.

1 Cook, Corp. 6th ed., Sec. 195.

The call was made in the year 1912.

A pleading alleging: "that each and every one

of the said causes of action as alleged in plaintiff's complaint did not accrue within six years before the commencement of this action" was held to contain a negative pregnant in

Gammon v. Dyke, 2 Wash. Ter. 266.

XII.

The attempted repudiation of the subscription in suit by defendant in April, 1907, was without legal effect.

Defendant's board, on April 10, 1907, by resolution affirmed its subscription in the sum of $125,000 and "no more" and directed its attorney to prepare the necessary notice to be sent by its secretary to plaintiff notifying the latter that no subscription was ever authorized in any sum whatever except for $125,000. (Ex. I, Record p. 60.)

That resolution and any notice under it were without legal effect for the following reasons:

1st. There was no previous subscription for $125,000 on behalf of defendant for defendant to thus affirm.

Notwithstanding the language of the resolution of defendant's board of Sept. 5, 1906, authorizing its president to subscribe in the sum of $125,000 to plain-

tiff's stock, there was no evidence of any such subscription having been made pursuant to that resolution or otherwise.

Rosene, when asked what he did under the resolution of September 5, 1906, so far as the subscription authorized was concerned, answered: "What was the use of subscribing for something which had already been paid, that would be another tomfoolery." And when pressed to state whether he signed another subscription he answered: "I don't know." (Record p. 170).

Kellogg, plaintiff's secretary, testified that he did not know of more than one subscription by defendant, the one in suit. (Record pp. 76, 77).

And Davies, present president of plaintiff, testified to same effect. (Record p. 76).

2nd. So much of the resolution of April 10, 1907, as attempted to repudiate any subscription in excess of $125,000, came too late. That was a year almost to a day after knowledge of the subscription in suit had been reported by Rosene to defendant's board.

A repudiation to be effective must be timely.

Six months' notice has been held to be untimely and without effect.

Rolling Mill Co. v. R. R. Co., 120 U. S. 256.

A year after knowledge has been held to be too late.

A. & C. Coml. Co. v. Solner, 123 Fed. 855, C. C. A. 9th Cir.

3rd. There was no proof of notice under the resolution. It is true that defendant's secretary testified that he mailed the notice (Dfdt. Ex. 3) to plaintiff postage prepaid and properly addressed; he admitted that he was not quite sure just when he sent that letter, but it was a matter that was very, very important to them and that notice would have been sent just as quickly as they would receive Mr. Hartman's instructions there; but there was no further proof on the subject, as to when or where he mailed it, or otherwise.

4th. Affirming its subscription on April 10, 1907, in the sum of $125,000 was an attempt to ratify the subscription in suit to the extent of $125,000 and "no more," which we have seen could not be done, and which in effect amounted to a ratification of the entire subscription.

We submit there was no repudiation of the subscription in suit in April, 1907.

XIII.

The court erred in entering a judgment or decree in favor of defendant and in not entering a decree in

favor of the plaintiff in accordance with the prayer of its amended complaint.

Twelfth, thirteenth and fourteenth specifications of error.

We submit:

(1st) That the issuance of 750,000 shares of common stock, full paid, to Rosene as a part consideration of the property conveyed by him to plaintiff was a legal and valid issue.

(2nd) That the defendant's board of trustees at its April, 1906, meeting, when the subscription in suit was reported to it, failed to affirm or disaffirm the same and by its silence acquiesced therein;

(3rd) That even if defendant's board at its April, 1906, meeting attempted to repudiate the subscription in suit, it failed to do so in failing to give notice of such repudiation to plaintiff and by consenting to Rosene's disposing of the subscription and of stock represented by that subscription, and by failing to place the plaintiff in *statu quo;*

(4th) That even if the defendant's board repudiated the subscription in suit at its April, 1906, meeting, it failed to adhere to such repudiation at its September, 1906, meeting; and at the latter meeting, at a time when but $75,000 had been credited upon the

subscription in suit on defendant's books and at a time when plaintiff was indebted to defendant, as shown by the latter's books, in the sum of $17,693 (not taking into consideration the $75,000 credited plaintiff as above), the defendant ratified the subscription in suit by attempting to ratify it in part, to-wit: to the extent of $125,000, that being for $50,000 in excess of what had theretofore been credited plaintiff and being for $33,000 in excess of what plaintiff then owed defendant, including the $75,000, assuming that defendant was entitled at that time to charge back to plaintiff the $75,000 theretofore credited on that subscription;

(5th) That between April 4th and September 25th, 1906, defendant paid plaintiff on account of the subscription in suit the sum of $125,000 and between April 4th, 1906, and November 9th, 1906, plaintiff issued to defendant and defendant accepted certificates of stock for 25,000 shares common, full paid, and for 25,000 shares preferred of plaintiff therefor; and defendant had notice by its acceptance of said certificates of stock as to its rights as a shareholder of plaintiff and as to the provision and terms contained and specified in the charter and by-laws of plaintiff, defendant thereby consented to, as in said certificates of stock expressly provided;

(6th) That on January 23, 1907, at a meeting of

plaintiff's stockholders at Portland, Maine, at which 25,000 shares common and 25,000 shares preferred of plaintiff, then owned and held by defendant, was represented and voted affirmatively, the purchase of the mining properties by plaintiff from Rosene for $250,000 cash and issuance of $3,750,000 common stock, full paid, was ratified and confirmed;

(7th) That no subscription was ever made to plaintiff's preferred shares in the sum of $125,000 on behalf of defendant and no payments were ever made by defendant on account thereof;

(8th) That the plaintiff at no time released the defendant from its liability under the subscription in suit;

(9th) That the attempted repudiation of the subscription in suit by defendant in April, 1907, a year after it was reported to defendant, was without legal effect;

(10th) That the plaintiff's right of action accrued within six years next preceding the commencement of this action;

(11th) That defendant for more than three years next preceding the commencement of this action, to-wit: from and after the month of October, 1908, had

knowledge that out of the issue of plaintiff's 750,000 common stock, full paid, as part consideration for said mining properties conveyed to it, 250,000 shares were retained by Rosene and his associates as a personal profit to themselves.

And for these reasons we submit that the twelfth, thirteenth and fourteenth specifications of error are well taken.

The judgment of the lower court should be reversed and a judgment or decree should be entered in accordance with the prayer of plaintiff's amended complaint and for costs of this appeal.

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